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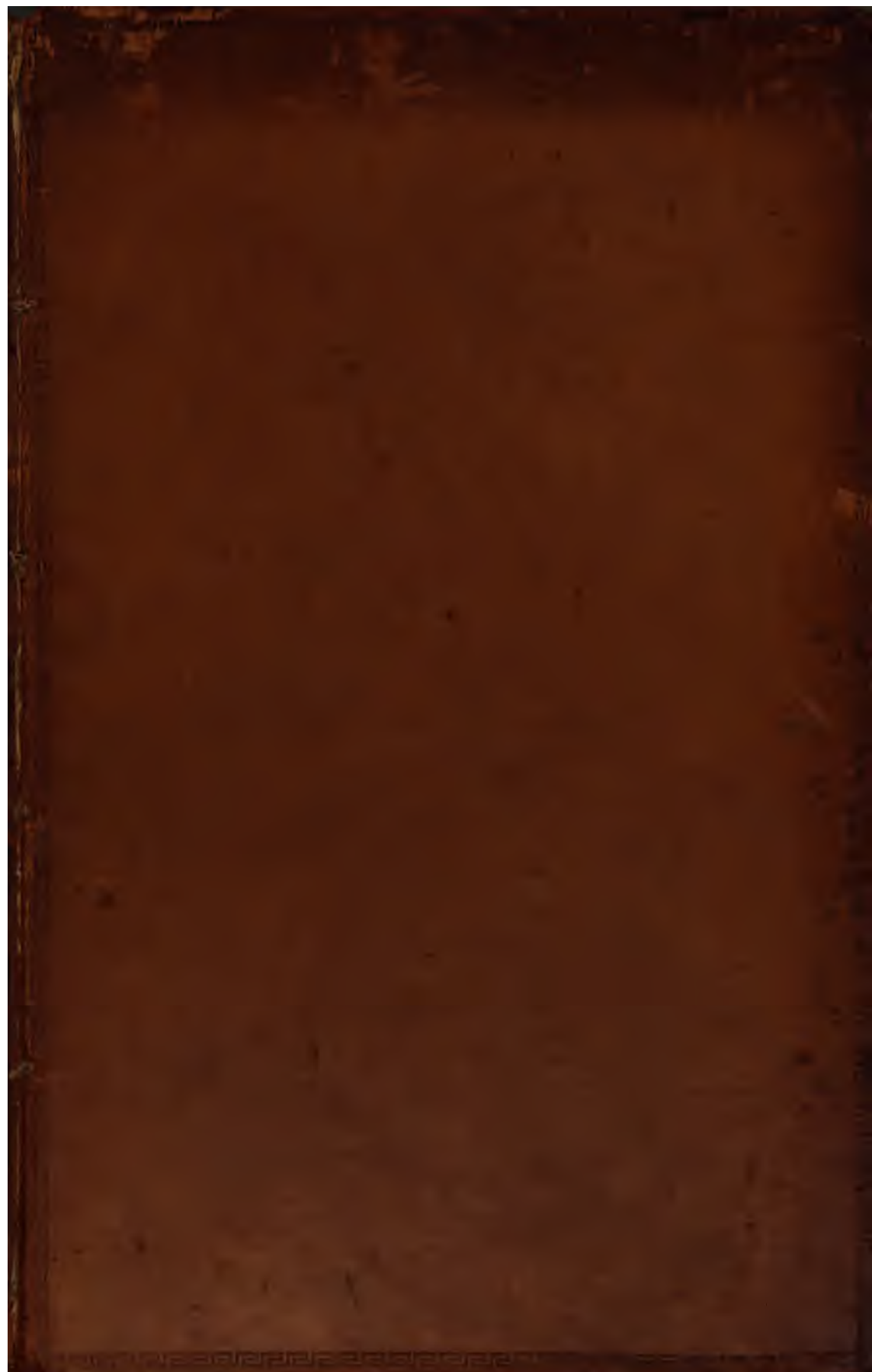
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R E P O R T S
OF
CASES

ARGUED AND DETERMINED

IN THE

KING's BENCH AND CHANCERY,

DURING THE TIME IN WHICH

LORD HARDWICKE

PRESIDED IN THOSE COURTS.

COLLECTED FROM A MANUSCRIPT NEVER BEFORE PRINTED.

Volet hæc sub luce videri.



TO WHICH ARE ADDED,
NOTES, REFERENCES, AND TABLES,
BY WILLIAM RIDGEWAY, ESQ. L.L.B.
AND BARRISTER AT LAW.

LONDON:

PRINTED FOR C. DILLY, IN THE POULTRY.
AND IN DUBLIN BY P. BYRNE, NO. 108, GRAFTON-STREET,
AND JOHN RICE, NO. 2, COLLEGE-GREEN.

1794.

TO
THE HONORABLE
ALEXANDER CROOKSHANK,
THIRD JUSTICE OF HIS MAJESTY'S COURT
OF
COMMON PLEAS IN IRELAND,
THE FOLLOWING WORK
IS
IN GRATEFUL ACKNOWLEDGMENT
OF
HIS FRIENDSHIP,
MOST RESPECTFULLY DEDICATED.

P R E F A C E.

THE high estimation in which Lord HARDWICKE's name is so deservedly held, has long excited a desire in the Law Professors of being acquainted with all his judicial determinations : —a desire not satisfied from what has hitherto been in possession of the public. How far the following Collection may contribute towards producing that satisfaction, the Editor will not presume to determine : but though these Reports may not comprehend so large a portion of the time in which Lord HARDWICKE presided as could be wished for, yet he trusts, if they do not add to the splendor of his Lordship's fame, they will not diminish the lustre of his reputation.

Anonymous

Anonymous Reports have ever been received with the most extreme caution ; the present work must encounter that disadvantage, as no account can now be given of its Author ; of whose merit, however, a very tolerable opinion may be formed, by comparing such of the following cases as are to be found in contemporary writers, with their reports of them. —The cases here published have been selected from a large manuscript volume (containing a number of others, the greater part in the time of Lord Chief Justice LEE) which formerly belonged to Mr. *Joshua Davis*, a Barrister of eminence, as remarkable for his integrity, as for deep research in his profession. Upon his death, it was purchased by his Majesty's present ATTORNEY GENERAL, who finding the cases in the time of Lord HARDWICKE of considerable use to him in the course of his practice, thought they might not be unacceptable to his Brethren of the Bar, to whom therefore he determined to present them ; but the duties of his important station not affording
leisure

leisure to superintend the publication, his partiality led him to make choice of one, who notwithstanding he has devoted ample time to the performance of the task, yet feels the necessity of soliciting the indulgence of the Profession for any inaccuracies their judgment may descry in his execution of it.

Marginal notes have been added by him to the several cases, containing the substance of the decision, and pointing to the different heads of the argument. The authorities quoted have been compared, and references annexed, principally to the modern books, in the course of which, more attention has been paid to the application of the cases, than to their number : —Some notes of cases in the *Irish* Courts have also been introduced, for the accuracy of which, the Editor alone is responsible. He wished to have taken them from a printed authority ; but it is to be regretted, that while the Irish Bench is adorned with splendid talents and profound erudition, their adjudications are suffered to perish in oblivion.

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P R E F A C E.

Tables of the cases and principal matters have been compiled in the usual way, and with these additions to the original, this work is now committed to the Professors of the Law, for whose advantage the publication was designed.

Bride-street,
October 27th. }
1794.

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I N D E X

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Michaelmas Term,

King's Bench

7th Geo. II. 1733.

LORD HARDWICKE, Chief Justice,
SIR FRANCIS PAGE,
SIR EDMOND PROBYN,
WILLIAM LEE, Esq. } Justices.

The KING *against* CARTER.

The KING
against
CARTER.

UPON Mr. *Parker's* motion to admit the defendant to bail, who, on the coroner's inquest was found guilty of manslaughter, though by the evidence set out on the inquisition it appeared to be murder, the court held clearly they were not to be guided by the conclusion of the jury, but must judge themselves upon the fact as set out; and though the party is found guilty of manslaughter only, before the coroner, he may afterwards be convicted of murder upon the trial.

A party found guilty of manslaughter by the coroner's inquest is not to be admitted to bail if the crime upon the evidence appears to be murder.

2 Kely. 159.
9 St. Tr. 718

Agreed likewise that the defendant could not by affidavit enter into any proof of his innocence, tho'

B

as

Nor can he by affid. enter into proof of his innocence.

1733.
 MAYOR OF
 LONDON
against
 TENCH.

as to any corruption or misbehaviour in the coroner or jury he might.

Motion denied.

MAYOR of LONDON *against* Sir FISHER TENCH.

In covenant forrent, assigning a breach that defendant did not pay, &c. without saying, "or his assigns," is sufficient, it having been averred, that defendant *huc usque habuit & gavisus est.*

A demise for 21 years under a *fl.* authorising a demise for 22 years is good.

S. C.
 2 Barnard
 266. 295.
 333.

IN covenant, the declaration recites an act of parliament empowering the city of London to grant licences to any persons for 21 years, to furnish the city with convex lights, for enlightening the streets of the city; and then sets out a grant thereof made by the city to Sir *Samuel Gerrard* and the defendant for 21 years, reserving a rent of 400*l.* a year payable by them, their executors, administrators, and assigns: and the breach assigned is, That Sir *Fisher Tench*, who is the survivor, has not paid the rent which was due at Saint John the Baptist, 1732.

The defendant craves oyer of the indenture and then demurs; and assigns for cause, That the declaration does not say that the defendant *or his assigns* have not paid, &c.

Mr. *Bootle* junior, The distinction is that where an act is to be done by a man and his assigns, there it must be averred that neither he nor his assigns have done it, otherwise indeed where an act is to be done to a man and his assigns, *Salkeld* 139. (a).

The second objection: It appears by the indenture, as set out upon oyer, that the act impowers the

(a) *Smith v. Sharp.*

the corporation to make grants for one and one and twenty years, which is for twenty-two years, and the grant mentioned in the declaration, is for 21 years only, which is a variance, and not pursuant to the power given by the act.

1733.
MAYOR of
LONDON
against
TENCH.

Mr. *Gerrard*, on the other side, it is said in the declaration that the plaintiff *huc usque habuit et gavissus est* the grant, &c. which excludes any possibility of assignment to any other person, and therefore it is sufficient to say the defendant has not paid.

Lord HARDWICKE, *Chief Justice*. If the city has a power for granting for 22 years, they certainly have a power for granting for 21 years, which is a less time, and so no variance at all.

Curia.

The distinction in *Salkeld* is a pretty nice one, and seems hard to be maintained, why should the court presume an assignment? It ought, I think, rather to come on the other side: but however this, defect, if any, is certainly supplied by the words *huc usque*, &c.

The court all of that opinion in both points, LEE, *Justice*, cited 1 *Cro.* 235.
Judgment for plaintiff.

1733.

SMITH
against
BOUCHER.

SMITH *against* BOUCHER, and others, B. R.

A custom for the plaintiff in an inferior jurisdiction to make oath that he has a personal action against the defendant and that he *believes* the defendant will run away, upon which the judge may award a warrant, &c. is not supported by an affidavit stating that plaintiff *suspects* the defendant will run away.

Where several join in a justification and it fails as to one, it is bad as to all.

Ca. Temp.
Hardw. 62,
68, 2 Stra.
993. S. C.
2 Barnard,
331. Cun.
89. 127.

2 Kel. 144.
pl. 123.
2 Wils. 385.

Perkins v.

Proflor.

3 Wils. 345.

Parsons v.

Lloyd.

Esplin. 329.

IN assault and imprisonment the defendants insist under a process issuing out of the vice chancellor's court of *Oxford*, the action here being brought against the judge of the court, the plaintiff in the action, the officer who arrested the now plaintiff, and the goaler, and set forth a custom, in the university, established among others by act of parliament, in queen Elizabeth's reign; whereby the court is impowered on complaint made by any person that he has cause of an action personal against another and what damage he has thereby received and makes oath of this, and that he *believes* the person against whom he has such cause of action will get out of the jurisdiction, that in such case they may issue a writ, to take and commit such person to goal unless he finds bail until the next court is holden. Then the plea sets out that one of the defendants had received a cause of personal action against the plaintiff, which he made complaint of, &c. and that the damage he thereby sustained was in his estimation to the amount of 1000l. and that he *suspected* the plaintiff, would make his escape out of the jurisdiction and that he made oath *de et super premissis*, and so justifies the commitment to goal.

The plaintiff replies, that no affidavit of the cause of action was filed as is required by the 12th Geo. I. before any *capias* can issue.

To this there is a demurrer.

Serjeant

Serjeant *Chapple* for the defendant. The replication is bad because the statute does not make the process void, but only inflicts a penalty on the officer, &c. for not complying with it. This appears from the penning of this and other acts of parliament where the process is expressly declared void when that was the intention of the law, so it is in the 5 Geo. 2. an explanatory act of the 12 Geo. 1st. the 7 of *Anne*, 12. 13 *Cha.* 2. 2 § 2. This is not unlike the case where an officer after an arrest refuses to take bail which does not make the officer a trespasser, 3 *Croke* 196. *Salmon and Percival*.

1733.
SMITH
against.
BOUCHER.

Hawkins, Serjeant, on the other side. The defendants plea in this case is ill, and if so the plaintiff must have judgment, whatever becomes of the replication;—There is in this case a mere nullity of jurisdiction and the proceedings being void all the defendants are trespassers, like the case of an appeal in common pleas. *Moor* 275, 1 *Hal. P. C.* 498.

This is a void custom; because it does not appear when the court is to be holden, at which the writ upon which the party is arrested is returnable. *Dyer*. 175. *Pl.* 23. 1 *Cro.* 647.

Secondly, because no *capias* can issue without a previous summons 1 *Roll. Abr.* 563. *Pl.* 11. 1 *Mod.* 236.

Supposing it then a void custom it cannot be confirmed and made a good custom by the statute of Elizabeth, which in general terms only confirms the charters and customs of the university,

1733.

SMITH
against
BOUCHER.

verity, and must have a reasonable construction,
1 Salk. 203. Plow. 399. Hob. 85, 86, 87.

But however the defendants have not brought themselves within the custom, there is no pretence of jurisdiction in the court unless there is a cause of personal action: now, it is said only, that the party complained he had such cause, &c. not saying that he really had. The nature of the injury also which the party received, ought to be particularly set out that it might appear to the court whether a personal action would lie for it, and not to make himself the judge thereof: it is said the damage which the party received was in his estimation 1000l which ought to be alleged more positively, and it is said only that the party made oath *de et super premissis* which is altogether loose and uncertain, and though this proceeding might not be looked upon as void with respect to the officer who executed the process, yet with respect to the parties to the action it will, 2 Jo. 290, and all the defendants in this case having pleaded jointly, if the plea be bad as to one, it is so as to all.

2 Lut. 935,
1 Ventr. 222.
1 Stra. 509.
1 Lev. 95,

Chapple, Serjeant.—We have set forth our case according to the custom and not in more general terms, and therefore this question will depend upon the validity of the custom, there are many customs in the city of London more extraordinary than this, which having the sanction of the legislature have never been shaken. A custom for infants to bind themselves apprentices. A creditor may arrest for a debt not yet payable, 2 Hen. 4. 12. Houses may be bought and sold by parol and without

out enrolment since the statute of enrolments. *Dyer*, 229.* Debts by simple contract are equal to specialties, 5 Co. 83 (b), and many others of this nature 8 Co. 126. a.

1733.
SMITH
against
BOUCHER.

*pl. 50.

LORD HARDWICKE, Chief Justice.—I was at first a little doubtful whether this was a case within the 12 Geo. 1st. it is no unusual thing that affirmative laws should not controul particular customs, as in the case of courts leet, where an usage to hold them at different times, than are prescribed by statute still prevails; but I find there are negative words in the act which will controul any particular customs inconsistent with the provision of the act; supposing this to be a case within the act, then the question will be, whether the non-compliance with the direction of the 12 Geo. will make the proceedings void?

The judge or the officer may be liable to an action for not pursuing the statute, where the person has received a particular injury thereby, or if it be a thing that is injurious to the public, it is an offence indictable, but still the proceedings in the action will not be affected by any such misbehaviour in the judge or officer, and therefore the replication in this case is certainly ill.

As to the custom itself, we must be very tender in determining a question of such consequence to the courts of both the universities, the cases which have been mentioned of customs within the city of London are very material.

There

(b) *Snelling's case.*

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There do indeed seem to be some imperfections in that part of the defendants justification by which they would bring themselves within the custom, as particularly that the party took an oath *de et super premissis*, the words implying no more than that the party took an oath relating to what is before mentioned.

But then the nature of this action is considerable, and I cannot think any imperfection of that kind will make any of the parties to the proceedings trespassers. The case of *Gwin and Poole, Lutw.* 935. 1560, is strong to this purpose, where it seems settled, that though the cause of action arises out of the jurisdiction of the court in which the action is brought; yet neither the plaintiff, judge, nor officer, are trespassers, or liable to any action of this nature.

PAGE and PROBYN, *Justices*, of the same opinion. And PAGE said, he doubted of what was said by *Hawkins*, that if the plea is bad as to one, it will be bad as to all (c), and put this case, suppose trespass and false imprisonment is brought against the plaintiff in a former action, and the officer and they join in a justification, under a judgment recovered against the now plaintiff, supposing in fact there is no judgment, the party to the action will fail in his justification

(c) 2 Wils. 385. It is said the officer and goaler could not have justified without the bailiff or vice-chancellor, as the whole proceeding was *coram non judice*, and a mere nullity:—The case of *Phillips v. Biron*, 1 Str. 509, supports the position, in general, that an officer forfeits his defence by joining with one for whom the warrant was no justification.

justification, but not the officer who has done no more than his duty in executing the process directed to him.

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LEE, *Justice*.—The replication is certainly ill, for the reasons which have been given, but it seems to me to be a considerable question, whether if the custom, which seems to me to be a reasonable one, be not pursued, the defendants will not thereby become trespassers, as in the case of an appeal in the common pleas before cited.

LORD HARDWICKE.—In the case of an appeal brought in Common pleas, there, the court has no jurisdiction; but here there is a jurisdiction, though it is not strictly pursued in all its circumstances.

Vide, *postea*. S. C. M. 10. G. 2.

Adjourned.

THOMAS *against* BISHOP. B. R.

UPON a motion for a new trial for a misdirection by PAGE, *Justice*, who tried the cause in London, to the jury, the case appeared to be—One *Mildmay*, a servant to the York Buildings Company in Scotland, draws a bill of exchange for 200l. payable to *Somerville* or order, and the direction of it is, “to *John Bishop*, cashier of the York Buildings Company in Winchester street, London”—and the conclusion of the bill was—“place the same

An action lies upon a bill of exchange against A. who accepts it generally, tho’ it was directed to him as cashier of a company and he desired to place it to their account.

to

Ca. Temp.
Hardw. 1.
563. 2 Kel.

S. C. 2 Barnard. B. R. 320. 335. 2 Str. 955. S. C. 3 Bac. abr. 136. Pl. 116. S. C. Mol. b. 2. ch. 10. f. 15. ‘Espin. 44.

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"to the account of the York Buildings Company." At the same time a letter is directed to the Company, advertising them of this draught upon the defendant *Bishop*. *Somerville* indorses the note to the plaintiff who applies to the defendant: He accepts it generally in his own name, not taking any notice of the Company. Upon the trial, *PAGE, Justice*, was of opinion, the defendant was chargeable with the payment of the money, and directed the jury accordingly, who found for the plaintiff.

Mr. *Strange*, Moved for a new trial, and insisted there were many circumstances in the case which made it appear highly probable that the defendant accepted this bill of exchange, not *jure proprio*, but as a servant to the Company. As first the direction of the bill to him with that addition, viz. "Cashier," &c.; the letter of advice from *Mildmay* to the Company relating to this bill and the conclusion of the bill, viz. "Place it to the account of the York Buildings Company," and not to the account of the drawer as in other cases, that these were such circumstances in favour of the defendant that it ought at least to have been submitted to the jury, as a matter of fact, whether the defendant accepted this bill in one capacity or the other?

Darnell, Serjeant.—In what right the defendant accepted this bill is not to be referred to a jury: by this acceptance of it in his own name and not as a servant to the company, he is become chargeable with the payment, any person may accept a bill though

though not drawn on him, and so make himself liable.

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Strange.—I agree a stranger may accept; but then it must be for the honour of the drawer, and so expressed in the acceptance in order to charge the drawer afterwards.

Lord HARDWICKE, *Chief Justice.*—Bills of exchange are contracts of a particular nature, and they must appear in writing, and no extrinsic evidence ought to be admitted, the drawee of a bill, &c. can no other wise accept than *secundum tenorem billæ*.

There are indeed some cases where the form of a bill of exchange is in some measure pursued, as by directing money to be paid to A. or order, out of a peculiar stock; but then it being directed to be paid out of a particular fund, they are not bills of exchange, but operate only as appointments to pay money: *Jocelyn and Laferne (a)*, Trin. 12 Anne. *Jenny and Herle (b)*, Pasch. 1. Geo. 1.

(a) Fortesc.
281.
10 Mod.
294. 316.
(b) 2 Ld.
Raym. 361.
Str. 591.
8 Mod. 265.

What is added to *Bishop's* name is not material, being descriptive only, and the letter of advice is a private transaction between the drawer and drawee, and which no other person can have any knowledge of: If any evidence to destroy the bill itself should be allowed, it would be very dangerous for any one to take an indorsement, and would prevent the circulation of such bills in a great measure.

The

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The rest of the Judges concurred, and the motion denied.

BRASSEY *against* DAWSON. B. R.

A collector of the land-tax becomes a bankrupt, but before assignment his goods are seized under a warrant from the commissioners of land-tax, this creates such a lien as cannot be defeated by the subsequent assignment. 2 Barnard 342. 382. 2 Str. 978. Cunn. 65. 'Elphin. 574. S. C.

UPON a trial before Lord RAYMOND, the point reserved was this. The collector having received the land-tax, commits an act of bankruptcy, the commissioners of the land-tax issued out a warrant of distress against him for such money after the time of an act of bankruptcy committed by him, and before the issuing of the commission; and the question was, whether an assignment of the bankrupt's effects will by relation vest a property in the assignees from the time of the act of bankruptcy committed, and so over-reach the intermediate distress?

Andrews
and Sir
M. Decker,
Cun. 65.

Serjeant Darnell for the plaintiffs the assignees, cited the case of Sir Matthew Decker, tried before Eyre, Chief Justice, *Pasch.* 3 Geo. 2. The action there, was brought against the defendant as sheriff, for a false return, for *nulla bona* to a *feri facias*, and the defendant in that case proving the person against whom the *feri facias* issued had committed an act of bankruptcy, the chief justice held *nulla bona* was a proper return, the parties after the bankruptcy not having any property in the goods.

Eyre, serjeant, on the other side. This must be considered as a debt due to the crown, and the prerogative

rogative will prevail against common persons, 3 Keb.

14. 1 Jones 203.

No property vests in the assignees until assignment; the bankrupts interest in his goods continues after his bankruptcy committed, and are liable to be taken in execution for his debts.

Darnell, serjeant. I agree no property vested in the assignees until the assignment, but still it is divested out of the bankrupt, it is like the case of administrators who by relation have a property in their intestates goods from the time of his death, and in the mean time they are in the custody of the law.

Lord HARDWICKE, *Chief Justice*. There are two *Curia*. points, first, considering this as the case of a private person, and as the case of the crown.

As to the first, though the property is not actually divested out of the bankrupt until assignment, yet when that is done, it relates to the time of the bankruptcy committed, so as to avoid all intermediate acts done by the bankrupts themselves, but not with respect to strangers, when the execution, &c. at the suit of any other person is completely executed; though where the goods are in the sheriff's hands, and the execution is not completed, it may be otherwise; as the present case is, the goods in the hands of the constable; and therefore the assignment in this case may prevail against the distress.

But considering this as an execution at the suit of the crown, it seems otherwise, and this a prerogative

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rogative case; for it is a debt owing to the crown for the use of the public. Suppose the act had granted this money to the crown without giving any particular remedy for the recovery of it, an extent from the exchequer might certainly issue, and the giving a summary remedy for the recovery of it, cannot alter the nature of the debt. In the case of an extent, the goods are bound from the *teste*: The king not being within the statute of frauds, &c. the relation of a property in the assignees to the time of the bankruptcy committed, cannot prevail in this case, because the king cannot now come in as a creditor, and so a wrong would be done by relation, which is to be always avoided.

LEE, *Justice*, cited *Holt's* opinion, Salk. 111.
 [This case was now adjourned, and argued again in *Hill. 7 Geo. 2.* as follows.]

Mr. *Strange* for the plaintiff. The collector of the land-tax the 7th. July 1731, became a bankrupt; on the 16th. the commissioners of the land-tax issue their warrant to levy the public money he had in his hands according to the direction of the land-tax acts in such cases, and the same day the bankrupts' goods are seized upon such warrant, a commission of bankruptcy is taken out on the 17th. the assignment made the 21st.; the goods taken away on the 22d. sold on the 16th. August.

I shall consider this case in two different views; first, supposing it to be between two private persons; secondly, as it is in the case of the crown:

It

It appears by 3 Geo. 2. c. 25. being the land-tax for the year when this matter happened, that the goods of the collector so to be seized by the warrant of the commissioners must be, not what he has in his custody, but what he has a property in at that time.

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The property was divested out of the bankrupt in this case on the 7th. July, the day the bankruptcy was committed, with respect to all persons except the crown, and then not until the assignment made.

This appears likewise by the words of 1 Jac. 1. That the goods of the bankrupt shall be distributed whereof no execution is served and executed before the act of bankruptcy committed. This seems clearly to be admitted to be law in 3 Leo. 69. 191.

In the case of *Hussey and Fiddell*, 12 W. 3. it was 3 Salk. 59. held that the assignees might either bring *trover* for 12 Mod. 324. goods sold by persons after an act of bankruptcy Holt. 95. committed and before commission, or might bring an action for money, allowing sale to be good. If the bankrupt had any property, in such case, the sale to an honest purchaser must at all events be good, which by that authority appears to be otherwise; for the assignees may either disallow the sale, or consider the bankrupt as their servant, and so bring an action for the money for the goods sold by him acting in that capacity under them: it is sufficient however for us if the property be in abeyance like the goods of an intestate when there is a contested administration; for if they are not in the bankrupt,

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within the act.

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As to the second point. If this warrant be equivalent to an *extent* for the king's debt, it will be against us, it being before assignment; but the collector here is not to be considered as a debtor of the crown, it is the receiver only and the division which is answerable to the crown; the receiver-general is appointed by the crown, the collector by the division, and no payment to the collector is a discharge of the division by the express words of the act, which is a very strong proof that he is not looked upon as a servant of the crown, and there is no danger in this case that the crown can suffer, there being a provision in the act for the reassessments on the division in such cases.

Supposing the crown has a power of proceeding against the collector in this case as its servant, yet this remedy by warrant is not equivalent or entitled to the same privileges as an extent; an extent is a common law process, a matter of record, and in the case of the crown binds from the *teste*. The king not being within the statute of frauds, &c. the warrant here is a matter *in pais*, and can it be imagined if the act had intended the crown should have a remedy in this case against the collector as their servant, the method of proceeding by extent would not be mentioned, or at least in giving this remedy by warrant declared that it should be equally advantageous to the crown? This method therefore seems to be designed merely for the advantage of the division, who were liable to make
good

good any deficiency, that they might get what they could from the collector in this summary way, and not that every inhabitant should be under a necessity of bringing an action to recover their several sums so paid to the collector.

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Adjourned.

In Trinity term 7 & 8 Geo. 2. Lord HARDWICKE, *Chief Justice*, gave the resolution of the court to this purpose.

The general question is, whether by the assignment the property in the bankrupt's goods passed to the assignees at the time of the bankruptcy committed? and we are all of opinion it did not. Two points have been made in the argument of this case.

First, supposing this to be an execution at the suit of a private person, the assignees would have been entitled. This depends on the construction which the statute of the 13th. *Eliz.* cap. 7. and the 21st. *Jac.* cap. 19. have received, the construction has been, That no interest in the bankrupt's effects is vested in the commissioners, but a power only of making an assignment, 2 *Jones* 196. and that where the commissioners have once executed that authority, the property is by relation vested in the assignees from the time of the bankruptcy committed, *Cole and Davies*, Hill. 10. W. 3. ruled by 724-
Holt, Chief Justice, That where execution is executed, and after the defendant becomes a bankrupt, that the subsequent bankruptcy will not affect that execution; otherwise if it had been executed since the bankruptcy committed, 3 *Lev.* 69.

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191. the delivery of the writ to the sheriff without an actual execution thereon before the act of bankruptcy, is no bar against the assignees (*d*). This is better explained by *Holt*, Chief Justice, in the case of *Higgit* against *Player*, *Salk.* 111. But yet until the assignment is made, the property is not in the commissioners, nor is it in abeyance, but it is in the bankrupt himself.

The second point is most material in this case, and first, it is to be considered, whether the bankrupt in respect of the sum which he had collected, and he had in his hands, was a debtor to the crown?

Secondly, what was the effect of seizure under the warrant of the commissioners?

As to the first, several objections are made; first, that the collector is not an officer of the crown; that the receiver is debtor to the crown; said likewise that the division is the debtor, and the collector a debtor to them only.

This question depends on the land-tax act of the 3 Geo. 2.; by that act the duty is granted to the king, and the subsequent clauses relate only to the manner

(*d*) An assignee may maintain *trover* against a sheriff who took the bankrupt's goods in execution after the act of bankruptcy, and before the assignment, and sells them after the assignment, the property of them being after assignment in the assignee, from the time of the act of bankruptcy by relation. *Cooper v. Chitty*, 1 Bur. 31. 32.

manner of the collection. The collector appointed by the commissioners is paid his salary out of the money collected, and on payment to the receiver, he is also expressly discharged against the king, and the division is only liable in the nature of a surety for the collector.

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Secondly, As to what is the effect of a seizure under the warrant of the commissioners, it must, if this had been an extent, prevail against the assignees; but this warrant it is said is a mere act *in pais* and not to be compared to an extent; to be sure it is not of equal force so as to bind from the date, &c. but it is plainly designed by that act in imitation of that remedy. (e)

The point we go upon is, that before the assignment here was an actual seizure for a debt incurred to the crown before the bankruptcy; and thereby such a lien on the bankrupt's goods created, as could not be defeated by the subsequent assignment, and that for three reasons:—

The first, because these goods were properly seizable, being the goods of the bankrupt at that time, as appears by *Salk.* 108, 111.

The second, The king is not bound by the statute concerning bankrupts not being mentioned therein, 1 Geo. 2, it is certain that in the case of the king the extent binds from the date, which would not be so if the king was included in those

C 2

acts

21 Jac. 1.
19 & 10.

(e) An extent is both an action and execution in the first instance, *ex parte Marshall*, 1 Atk. 262.

1733. acts as appears by 3 Lev. 191. The word *extent* in those act relates only to private persons, and this is farther illustrated by the clause in 21 *Ja. 1.* relating to extents in aid; extents in case of the crown before assignment are good 2 *Sbo. 481. (f)* But it may be said why should the king be any more bound by the assignment, than the bankruptcy: because by the assignment, there is a property actually vested in others which cannot be divested even in the case of the crown.

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Sheffield v. Ratcliffe. The third reason is, that the king is never affected by relation, *Hob. 339*, and this relation here is founded upon the construction of the statute relating to bankrupts in which the king is not included.

But it is said, if this should prevail, the king by a debt contracted since the bankruptcy may defeat the creditors of all their just debts; but in answer to this, In the first place fraud is not to be presumed in the crown. Secondly, this would be the act of the bankrupt himself after the bankruptcy committed, and he then can do no act injurious to his creditors, *Salk. 108*. Creditors not hurt by the bankrupt's outlawry.

Another objection was, that no sale was made of the goods in pursuance of the seizure until after the assignment.

(f) *The Attorney General v. Capell*, where it is also said "Extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias*, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered."

assignment; as to that, from the time of the seizure the goods were in *custodiâ legis*, and not liable to any other until the money for which they were so seized was paid, *Cro. Car.* 148, 1 *Jo.* 202, there held that goods extended before any act of bankruptcy committed, and no *liberate* sued out until after; yet were not assignable by the commissioners which comes up to the present case, the act of bankruptcy being the same thing among private persons who are creditors as the assignment in case of the crown.

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Judgment for the defendant (g).

(g) Note.—It appears from Sir *John Strange's* report of this case, that the defendants having acted as officers, the plaintiffs were ordered to pay treble costs. 2 *Stra.* 982.

KENT against KENT. (h)

WRIT of error of a judgment in dower given Where there in Common Pleas in Ireland, and affirmed in the are two tenants in a writ of dower and one dies King's Bench there.

Mr. and his heir and the surviving tenant

bring error and judgment affirmed, the value from the judgment to the affirmation should be against both the heir and the survivor, and in such case under 16 & 17 *Car.* 2. c. 8. § 4. a writ of enquiry should be awarded.

But though a judgment against the survivor only be for the benefit of the heir of the deceased tenant, yet such heir may take advantage of the objection upon a writ of error.

2 *Barnard.* 357. 386. 441. 2 *Kely.* 194. 2 *Stra.* 971. *Cun.* 44. *Ca. Temp. Hardw.* 50. S. C.

(h) Mr. Serjeant *Barnardiston* in his report of this case, states a question which was made upon the construction of the *Ir. act.*

6 *Ann.*

1733. Mr. *Strange*, for the plaintiff in error, took five exceptions.

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The first, that the value of the dower and damages was given to the time of the judgment, and it appears upon the record the action was not brought until two years after her husband's death, in which cases damages are not recoverable. *Co. Lit.* 22—b.

The second, sixpence damages and sixpence costs are given in the Common Pleas, and yet no judgment taken for either of them, nor any *remittitur* of them on record.

The third, upon the affirmance of the judgment in the King's Bench in Ireland 300l. damages and costs are given according to the 3 *Hen.* 7. 10, but not said *occasione dilationis executionis*, &c.

The fourth, it appears by the record that the writ of error in the King's Bench in Ireland was first

6 *An. c.* 16. an act to prevent persons marrying children against the will of their guardians: it provides "That if any person shall by any *subtle means* marry a man under the age of 21, having an estate of "land of the yearly value of 50l. she shall be barred of her thirds, &c." A special verdict was found, stating that demandant's husband was under 21 at the time of the marriage, that his father was seized of an estate of inheritance of 50l. *per ann.*; that he married without consent, but that demandant had used *no subtle means* &c. The question was, whether the demandant should be barred of her dower. The point is not taken notice of in the above report, and indeed the finding seems to have precluded the question. The point is also omitted by Sir John *Strange* in his report of the same case.

first brought by two persons, who were defendants in Common Pleas there, that one of them died, and afterwards a writ of error *coram vobis* was brought by the person survivor, and the heir of the person so dying and in the entry of the judgment in the King's Bench all the costs and damages are awarded against the survivor, whereas it ought to be against both.

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The fifth, the plaintiffs in the writ of error are amerced.

Mr. Parker, in answer.—As to the first exception, if the plaintiff in the writ of error would have any advantage of the time when this writ of dower was brought, the original writ ought to have been before the court by *certiorari*, and no regard is to be had as to the time as it appears by the recital under the *memorandum*, &c.

Besides it appears in the same page in *Co. Lit.* that if the defendant in a writ of dower would take advantage of the laches of the widow to bar her of her damages he ought to insist upon it in pleading by shewing he was always ready, &c.

As to the second, the sixpence damages and sixpence costs are included in the sum mentioned under the words *quæ in toto attingunt*, &c. upon the affirmance in the King's Bench ; but however this is a miscomputation only which will not be error,
1 Jo. 171. Palm. 510.

As

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Fannery. Sty.

As to the third, no courts of justice are obliged to give the reason of their judgment, and therefore the words *occasione*, &c. not necessary; but however if that were so, yet this error in entering the damages and costs will not affect the principal judgment in dower. *Styles* 290. 7 *Mod.* 150.

As to the fourth, the heir of the person dying is joined for conformity and the damages survived against the other.

As to the fifth, an amercement is a punishment by the court for prosecuting without cause, which appears by the affirmance of the judgment to be the case here, and therefore very proper, 2 *Saund.* 226, *Salk.* 253. however this is cured by 16 & 17 *Car.* 2.

LORD HARDWICKE, *Chief Justice*—Both the answers given to the first exception are good.

As to the second, it appears by computation that that the fixpence damages and fixpence costs are included, &c. However, that is such a mistake as may be set right at any time.

As to the third, though the precedents are *occasione dilationis executionis*, yet the general rule is, no court of justice is obliged to give the reason of its judgment, so it is in the case of justices, &c. But it appears here likewise that the defendant in error has been delayed of her execution by the writ of error which the court will take notice of.

As

As to the fourth, the judgment for the damages and costs being grounded on the statute and the principal judgment on the common law, it is reversible *quoad* that part only; but I cannot see how this can be assigned for error; the person against whom no damages are awarded cannot, because it is for his benefit, and there both of them have joined in the writ of error.

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As to the fifth, I never saw a *misericordia* upon a writ of error, but this is aided by 16 & 17 Car. 2.

Adjourned.

At another day Lord HARDWICKE said he had looked into the books, and found many precedents and cases where things for the benefit of the party may be assigned for error, and cited 1 Ro. Abr. 2 Show. 56. 759. Yelv. 107. 8 Co. 117. Beecher's case; and 88. therefore desired that point only might be spoke to again.

LEE, Justice, 4 Leon. 6. to the same purpose.

In Hillary Term, 7 Geo. 2. this single point was argued, whether the judgment was right in awarding the damages against the surviving plaintiff in error only?

And in Easter term 7 Geo. 2. Lord HARDWICKE, Chief Justice, gave the resolution of the court,

There are three questions:—

First,

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First, whether the King's Bench in Ireland ought to have given any judgment for the damages incurred, since the first judgment obtained in Common Pleas there?

Secondly, Whether they are regular in giving them against the survivor only?

Thirdly, yet whether that can be now assigned for error by both as it is for the advantage of the person not charged with the damages?

As to the first, the court ought to give judgment for the damages incurred since the first judgment; but that power is not given by the statute of *Merton*, the provision there being only for the damages *à morte*, viz. to the time of the first judgment; the inconvenience widows were under in being kept out of their dower a long time, gave occasion to that provision made in their favour by the 16 & 17 Car. 2. sect. 4. which directs a writ of inquiry to issue for the recovery of damages subsequent to the first judgment. This act was made an *Irish* law the 17 & 18 Car. 2.

Andr. 153. As to the second point, by this act the other plaintiff in error is clearly liable to those damages as much as the survivor:—but there is a stronger objection to this judgment which has not been mentioned at the bar: it appears that no writ of inquiry was awarded in this case which ought to be, the statute requiring such judgment to be given for those damages upon the return of the writ of enquiry. It may be objected that the value of the lands

lands recovered in dower, which is the measure of damages, is ascertained by the verdict as it lies in computation only, the court might do it without any inquest at all, as it is in the statute of *Merton* when the value of the lands recovered appears by the verdict the court gives judgment for the damages; but the statute of *Merton* directs not any writ of enquiry to issue, and the manner of giving them is discretionary in the court. *Raff.* 230. 2 *Saund.* 335. 1 *Lut.* 719. 1 *Leo.* 92. The case indeed in 2 *Saund.* 335. seems to contradict this opinion, but it does not appear by that case this point ever came in question; besides the damages there are not given *pro valore dotis*, but *pro dilatione executionis*, on the 3 *Hen.* 7. 10.

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As to the third point; both may properly join in this writ of error. It is true in general the rule is, that the party cannot assign for error any thing beneficial to him, summons and severance is the common practice in such cases, 1 *Cro.* 892. & 1 *Saund.* 239. *Yelv.* 3.; but that rule must be construed with this restriction, that the party shall not assign for error any mistake in process, delay, &c. which is in his favour, otherwise it is where the fault lies in the judgment given by the court. 8 *Co.* 2 *Saund.* 45. *Yelv.* 107. 1 *Ro. Abr.* 759.

Noy 44.
Cro. Jac.
92. 117.
1 Bac. abr. 7.
10 Co. 134.
6 Co. 26.
8 Co. Beecher's case.

There can be no doubt but this judgment may be partly affirmed and partly reversed, as part of it is grounded on common law, and part on statute. 1 *Salk.* 24. (a), and 7 *Mod.* 154. S. C.

March. 88.

The

(a) *Cutting v. Williams*, 2 *Ld. Raym.* 825. *Lill. Ent.* 227. S. C.

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Salk. 401.
pl. 8.

The question then will be, what judgment we are to give? The general rule is, that upon a reversal of a judgment here, this court is to give such a judgment as the court below ought to have given. *Cro. Car.* 442. (b). But in this case we can give no judgment for these damages, but must remit the record to the King's Bench in Ireland, requiring them to award a writ of enquiry to the sheriff of Kilkenny where the lands lie, and upon the return of that writ the court are to give judgment for the damages. 2 *Cro.* 534. *Cro. Car.* 511. 512. *Telv.* 74. (c).

This case is not unlike proceedings in the Exchequer Chamber where they remit the record to this court to award execution. 2 *Cro.* 206. *Carth.* 180.

Judgment therefore must be affirmed as to the recovery of dower and the award of feilín thereon; and reversed as to the damages and a mandate to issue to the court of King's Bench in Ireland to award such writ of enquiry.

(b) *Slocumb's case.*

(c) By 22 G. 3. c. 53. & 23 G. 3. c. 28. Eng. No writ of error or appeal shall be received or adjudged, or any other proceedings be had by or in any of his majesty's courts in *Great Britain* in any action or suit at law or in equity instituted in any of his majesty's courts in *Ireland*.

GILMORE *against* HORTON.

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GILMORE
against
HORTON.

THIS and many other cases of the same nature having been long depending for judgment of the court where the damages laid in the declaration have been more than 10l. and less found by verdict, and the proceeding in such case in Latin.

Under the statutes limiting the quantum of damages for which an action may be brought, the cause of

the damages declared for, and not those found by the verdict, are action.

LORD HARDWICKE, *Chief Justice*, now delivered the opinion of the Court in this manner. The principal argument that has been made use of in support of such proceedings is the hardship the suitor would be under, if in actions which lie in damages, the money found by the verdict to be due to the plaintiff should be construed to be the cause of action, the act will easily be evaded and rendered ineffectual.

We are of opinion, the damages laid in the declaration are the cause of action; if this matter rested merely on the 5 Geo. 2. it might be a very considerable question, and some inconvenience might have attended a determination either way; though it seems as it stands upon that act only, this would be the most proper construction. The words "cause of action," in the 12 Geo. 1. must mean the charge laid in the declaration; and that act being recited by the 5 Geo. 2. is material in this case. In the clause of the 5 Geo. 2. relating to special writs, the words "cause of action" must have this construction,

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struction, or otherwise attorneys, &c. would be liable to penalties which it is not in their power to avoid.

In pleading the statute of limitations to an executory contract, it is said, *causa actionis non accrevit*, &c. which must refer to the demand laid in the declaration.

The statute of *Gloucester*, 2 *Inst.* 310. has restrained the superior courts from proceeding in actions under forty shillings. Lord *Coke* says, that clause has received this construction, that it must appear to the court the action is for less than forty shillings, and not by the verdict to bring the case under the restriction of that clause.

In *Bro. Abr.* Title Jurisdiction, pl. 40. it appears, that if in an action brought in a court baron or other inferior court which cannot hold plea of actions above 40s. though above 40s. is recovered, the plaintiff may remit what is more than 40s. and take judgment for the residue, which proves the damages found by the verdict are not the rule to go by: for if so, it would appear by the verdict the cause of action was such of which the inferior court had no jurisdiction.

But whatever doubt there might be on the 5 Geo. 2. it seems cleared up by the 6 Geo. 2. relating to the proceedings in *Wales*. That act was plainly intended to extend the same provisions to *Wales*; and in that act the words are "debt or damages declared," which, from the nature of the thing, must be

be intended to mean what in the other act is called "cause of action;" and this therefore is a parliamentary exposition of what they mean by the expression, cause of action.

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GILMORE
against
HORTON.

Hilary Term,

7th Geo. II. 1733.

The KING *against* HOOKER.

MR. *Hussey* moved for an information against the defendant for a cruel assault and battery committed on a person in *Newfoundland*; but the motion denied, the offence being local, and the case of an information not distinguishable from that of an indictment.

An information for an assault in *Newfoundland*, refused. 2 Kely 190. S. C.

THE KING *against* HALFORD.

UPON shewing cause why an information should not go against the defendant, late mayor of the borough of *Evesham*, for not holding the borough-sessions

An information against the mayor of a borough for not holding the courts week-

ly according to the charter, refused, because the neglect did not appear to be wilful, in delay of justice, or oppression of the subject.

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 against
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sessions and courts of record for the borough weekly, according to the direction of the charter,

It was said by Lord HARDWICKE, he would never consent to grant such informations unless it appeared such neglect was wilfully committed in delay of justice and oppression of the subject, and that a contrary practice would subject almost all the mayors, or other chief officers of corporations through all the kingdom to such a punishment, who it is well known, do not, nor indeed is there occasion to hold courts as often as by their charter they are empowered to do.

Serjeant *Hawkins* on the other side of the motion insisted, that, though it did not appear in this case there were any particular persons who suffered by the mayor's neglect in holding courts, and that might be a very proper defence against any action, yet being a public office, any neglect therein, though not attended with any special damage, was punishable criminally, and urged the common distinction, that private offices, such as park-keeper, &c. were not forfeitable unless some injury was sustained, but that in public offices it was otherwise:

Lord HARDWICKE, *Chief Justice*, and *Page*, justice, said, that was not law, and that it was so determined in serjeant *Whitacre's* case (d), that a forfeiture of a public office could not be incurred without

(d) *Regina v. Ballivos, &c. de Gippo*, 2 *Ld. Raym.* 1232. That was an application for a *mandamus* to restore Mr. serj. *Whiteacre*, who had been removed from the office of recorder of Ipswich.—The case

out some special damage sustained, any more than a private one.

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THE KING
against
HALFORD.

Refused.

THE KING *against* POLE.

UPON motion for an information in the nature of a *quo warranto* against the present mayor of Liverpool, the case appeared to be,

The election of a mayor the day after that which is appointed by the charter, is void.

By the charter the mayor is to be elected on St. Luke's day, being the 18th. October, and no provision made for holding over. Upon the 18th October last, the corporation met, and proceeded to the election of a new mayor; but before the poll was ended, Mr. *Brereton* the then mayor ad-

D

journed

case as reported in *Ld. Raym.* does not appear to support the position above, for in p. 1237, the court are made to say in 2 *ref.* "This being a public office concerning the administration of justice, the officer is to attend at his peril, and non-attendance is a cause of forfeiture of his office, though *no inconvenience* ensue by his non-attendance. And so is *Co. Lit.* 233. a. 9 *Co.* 50." In *Salk.* 435. S. C. The recorder is bound to attend and assist at the sessions, to direct the corporation in the proceedings of justice; and that his office being a public office relating to justice, non-attendance is a good cause of forfeiture. *Vid. Holt.* 443. 1 *Ventr.* 143. 2 *Keb.* 770, 796. *Sid.* 15. *Cro. Car.* 491. But in 1 *Hawk. P. C.* c. 66, s. 1. it is said this opinion doth not appear to be warranted by any resolution in point; and the authorities which are cited to maintain it, do not seem to come up to it. And in 4 *Burr.* 2004. *Rex v. The Corporation of Wells, Ld. Mansfield* says, the law is well laid down by serjeant *Hawkins* in the passage above cited from his *Pleas of the Crown.*

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 The King
 against
 Pole.

journe'd the election to the day following, when Pole was elected by a majority of voices.

The objection taken to his election was, that there being no provision by the charter for the mayor to hold over, his office was determined on St. Luke's day, and the proceeding to an election of the present mayor on the day following was irregular and void. It was insisted that this was a case not within the 1.1 Geo. 1.; that the provision of that act is, that where a mayor, or other head-officer of a corporation wilfully absents himself on such election days, that he may proceed to an election on the day following, or in his default the senior alderman, &c.; but that act must be construed where the first step in the election is taken on the day after the charter-day, that what was done here on the second day was no more than a continuation of the business begun the day before, and therefore this not a regular election within the act.

The whole court clear of opinion this was a void election at common law for the reason before given: Lord HARDWICK, and two other judges, of opinion likewise that this was not a case within the act; but LEE, *Justice*, seemed to think otherwise, the words of the act being "in order to compleat," &c.

Information granted (b).

(b) 2 *Burnard* 447. A verdict was found for the crown, but contrary to the direction of the judge:—A motion was made for a new trial,—the judge having directed the jury to find a special verdict for the purpose of giving the court above an opportunity of determining

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COMBER *against* HILL.

COMBER
against
HILL.

UPON a special verdict in ejectment found at the assizes in *Suffex*, the case was this.

To raise
cross remain-
ders in a will
there must be
either express
words or a
necessary im-
plication.
2 Barnard.
367. 443.
Ca. temp.
Hardw. 22.
2 Stra. 969.
2 Kely. 188.
S. C.

Richard Holden seized in fee by his will the 11th *March*, 1698, devises the premises after several preceding limitations, which are spent, in this manner; *To my grandson Richard Holden, son of my son "Thomas deceased, and to Elizabeth daughter of my son Richard, to be equally divided between them, "and to the heirs of their respective bodies; and for "default of such issue; to my grand daughter, Ann "Holden in fee."*

Testator dies seized 25th *March* 1699: afterwards *Elizabeth* dies without issue. The lessor of the plaintiff claims her moiety in right of *Ann* his wife, *Richard* claims the whole as survivor, upon a supposition there were cross-remainders created by the will.

Belfeld, Serjeant, for the defendant, relied principally on the case of *Holmes and Maynell*, 2 *Jones* 172, he cited likewise 4 *Leo*, 14.

D 2

Daniel

termining whether the case came within the statute 11 Geo. 1.; but the jury found a general verdict, which was set aside by the unanimous opinion of the court. *Ca. Temp. Hardw.* 23. The *King v. Poole*, which case, among others, is referred to by Mr. *Hargrave*, in his edition of *Co. Lit.* 155. b. n. 5. where with peculiar brevity, learning, and discrimination, he expresses his ideas upon the respective provinces of judge and jury.

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Daniel, Serjeant, on the other side.—The case of *Holmes* and *Maynell* is clearly distinguishable from the present case, there the devise was, “ of all my land, &c. to my two daughters, &c. and in case “ they happen to die without issue, then, &c.” Great stress was there laid upon the words *all* and *they*, which raised a strong implication that the testator did not intend he in remainder should take any thing until both the daughters were dead without issue.

There the devise was likewise to a nephew, a person not so nearly related as the first devisees, who, were his daughters, which is taken notice of in that case as a favourable circumstance to create cross-remainders.

Curia.

Lord HARDWICKE, *Chief Justice*.—The case of *Holmes* is great authority, and will have its weight with the court unless it can be distinguished materially from the principal case. There can be no doubt but *Richard* and *Elizabeth* were tenants in common in tail. Then the case will be the same as if the testator had given one moiety to *Richard* and the heirs of his body; the other to *Elizabeth*, &c. and if the devise had been expressed in that manner, could the subsequent words “ in default of such issue,” be taken in any other sense than in default of such issue respectively, the remainder over should take place: The expressions in the case of *Holmes* are very different in the instance cited, which had great influence upon the court in the resolution upon that case. I desire those who are to argue next to endeavour to find a case where after a tenancy

nancy in common in tail created, those subsequent words "in default of such issue" have ever been held to raise cross-remainders.

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In Easter Term following, Lord HARDWICKE delivered the resolution of the court to this purpose: To raise cross-remainders in a will, one of these things is necessary, either express words, or the plain and manifest intent of the testator; there are certainly no express words, but it is contended the intent of the party appears to be such by a necessary implication, the words relied on are "and in default of *such* issue" and that the word *such* must mean both *Richard* and *Elizabeth*. These words may in the natural sense be construed either conjunctively or disjunctively, upon that clause in the will the matter stands indifferent; but taking the whole will together it seems clear there can be no cross remainders. If it had been "in default of such respective issue," or, "in default respectively," there could be no question in the case, and the word *such* in this clause being a relative term and referring manifestly to the preceding words "heirs of their respective bodies" it amounts to the same thing; the relation the three devisees bore to the testator appears upon the face of the will, all of them his grand children, and wherever that has appeared, it has been made use of as a proper argument to direct what construction is to be put upon the will. The case of *Holmes* is distinguishable from this both in respect of words and the intention of the testator. The words there are, "if they die without issue." The construction put upon the word *they* was, "if both of them" &c.
the

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against
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the word *respective* is wanting there; the devisees there were the testator's daughters, and he in remainder a nephew only, upon which great stress was laid. The same observation holds with regard to the other cases cited, *Dyer* 326, 330, 4 *Leon.* 14.

Judgment for the plaintiff. (c).

The KING against GRIFFIN, and others.

A charge against trustees of a breach of private trust proposed in them by the parishioners is libellous.

The name of some person injured by a libel must be stated on the record: but it is not necessary to set out the name of every person injured.

2 Barn. 368.

2 Kely. 292.

S. C.

THE defendants, church-wardens of the parish of *Lambeth*, having been convicted on an information tried at *Surry* assize for a libel in giving public notice in the church, thereby desiring the parishioners to meet and assist them in correcting several abuses, which by reason of the pretended authority of the trustees appointed by the parish for the management of the work-house there, had been suffered to be committed.

It was insisted on, among many other objections to the information, in arrest of judgment.

First, this was no libel.

Secondly,

(c) *Vid.* Sir T. Raym. 452. Pollex. 425. Skin. 17. Williams v. Browns, Stra. 996. Wright v. Holford Cowp. 31. Perry v. White, Cowp. 780. Phipard v. Mansfield, Cowp. 797. Atherton v. Rea 4 Term Rep. 710. Davenport v. Oldys 1 Atk. 379. Doe v. Wainright 5 Term Rep. 427. Hargr. & Bull. Co. Lit. 195. b. n. 1. and Abern lessee of Gibbings v. Conran MS. Ca. C. B. in Ireland Hil. 1792.

Secondly, that it is said to be a libel on three persons whose names are particularly mentioned, *ceterisque fiduciariis*, whereas the other trustees ought to be specially named, or otherwise the defendants will be subject to infinite prosecutions at the instance of the other trustees severally.

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against
GRIFFIN.

Lord HARDWICKE, *Chief Justice*.—It cannot be taken upon this information that this is a charge on the trustees of any breach of public trust, the erection of this work-house and the government thereof not appearing to be by act of parliament, or any public authority; but a breach of a private trust reposed in them by the parishioners, and any such charge is equally punishable as a libel.

As to the second objection, there are indeed authorities, where, in cases of libels upon persons in their private capacities, it has been held necessary some particular person should be named as the subject of the libel. *The King v. Orm*, 11 W. 3. There an information for a libel on certain persons unknown was held ill; but this was never carried so far as to make it necessary that every person injured by such libel should be specified. The omission of *ceteri fiduciarum* in this case would have been immaterial, the charge of abuses upon the three person specified only being sufficient to maintain the information, and there is no danger of subjecting the defendants to other prosecutions for this offence. The conviction on this information will be a sufficient bar to any other, it being one single offence, though every person injured by this libel might have an action against the defendants in regard of the several

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The KING
against
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several and special damages which each has sustained.

Judgment for the king.

ARTHUR *against* VANDERPLANK.

Acceptance of rent from the assignee of a term by lessor, is not a good plea in bar upon *covenant*, tho' otherwise in *debt*.
2 Barn. 372.
2 Kely 167.
S. C.

COVENANT for rent. The defendant pleads an acceptance of rent from the assignee of the term by the lessor the plaintiff, to this there is a demurrer, and the court clearly of opinion such acceptance of rent was no bar to a recovery in *covenant*, though otherwise in *debt*.

Judgment for defendant.

Vide Cro. Car. 188. &c. *Leach's* edit. and the authorities there cited.

BILSON *against* HILL.

WRIT of error in *assumpsit* brought on a promissory note by the indorsee against the indorser, objected that no default of payment by the drawer upon application to him, was laid in the declaration.

Curia.

There is an express promise of payment to the indorsee laid in the declaration; the other is matter of evidence only.

Judgment affirmed (*b*).

(*b*) I apprehend the safest way is to aver that payment was required of the drawer, who refused, and the precedents are so. *Shearman v. Wright*, *Lil.* 54.

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The KING
against
Sir ROBERT
GROSVENOR.

THE KING *against* SIR ROBERT GROSVENOR, & *al.*

UPON a motion for an information in the nature of a *quo warranto* against the defendants, corporation-officers of the city of *Chester*, among other things, it appeared by a charter granted the 16 Car. 2. the right of election of corporation-officers was vested in the mayor, aldermen, and commonalty at large; the defendants were elected by part of the corporation exclusive of the commonalty, and an usage set up to justify such election.

An usage in contradiction to a charter is void. Upon a judgment in a *quo warranto* information, the corporation itself cannot be dissolved, but only the particular franchises abused are seizable by the crown. 4 Mod. 52. The King v. Amery, 2 Term Rep. 515.

The Court held clearly no usage could controul the direction of a charter of so modern a date, and Lord HARDWICKE mentioned the case of the corporation of *Brocknock*, where the charter which was granted in the reign of *Philip* and *Mary* directed corporation-officers to be chosen *de inhabitantibus*, and an usage had prevailed from the 15 *Elizabeth* to elect them without having any regard to inhabitancy to that time; upon a special verdict it was held in this court that such usage in contradiction to the charter was void, and the judgment upon a writ of error was affirmed in the House of Lords. Agreed also in this case, that upon a judgment in an information in the nature of a *quo warranto*, the corporation itself cannot be dissolved, but only the particular franchises abused are seizable by the hand of the crown.

READ

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READ
against.
DEATARY.

READ against DEATARY.

A prohibition will go to the ecclesiastical

court, taking cognizance of tithes or offerings claimed upon a custom which is disputed, and that as well after sentence as before.— Otherwise where they are by endowment.

2 Kely 196.

2 Barnard

392. S. C.

Cowp. 422.

Doug. 378.

1 Term Rep.

552.

2 Term Rep.

473. 649.

3 Term Rep.

315.

4 Term Rep.

397.

UPON shewing cause why a prohibition should not go to the spiritual court? the case was this,

The plaintiff below libels for tithes for agistment of unprofitable cattle, and likewise for an annual offering of seven pence payable at easter, and claims them as vicar of the church of *Bishop-Wilton*, *tam ex delatione, fundatione, &c. quam ex antiquâ consuetudine*, the defendant denies the right to, &c. in the words of the libel, and sentence for the plaintiff; the suggestion for a prohibition is, that the rector is intitled to such payments and the customs are triable at common law.

Dr. Lee against the prohibition; the payment to the rector is a new matter not pleaded below, and therefore not proper to be inserted in the suggestion. 1 *Ventris* 335.

The demand here is founded on the endowment, which is certainly a matter of spiritual conuzance the words *ex antiquâ consuetudine* are inserted in all libels and are matter of form only; as to the tithes; the words of the endowment are, *decimas blandarum, croftorum, crescentium infra claufuras, &c.* which extend to the present demand: as to the offering, the words of the endowment are of every thing *quæ ad altaragium pertinent*; a term which in the case of *Turner v. Andrews* was construed to comprehend all ecclesiastical demands, though it seems

to

to carry with it a more restrained sense; but however, as offerings cannot otherwise be due but by custom and jurisdiction of proceeding in such cases is certainly given by the statute *de circumspēcte agatis*, &c. 27 Hen. 8. c. 20. 32 Hen. 8. c. 7. 2 Ed. 6.; the right of trying customs in such cases in consequence is given to the spiritual courts. This motion also comes too late, being after sentence, 1 Cro. 595. 2 Keb. 612. Noy. 70. *Wright v. Allen*, 9th Nov. 1723. An action brought in the admiralty upon a contract laid to be made *super altum mare*, and sentence given for the plaintiff, a prohibition was moved for upon suggestion, that the contract was made in the harbour of *Plymouth*; but denied, because that it did not appear upon the libel, in which case only prohibition lies after sentence.

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Mr. *Boote* senior. The contest here is between spiritual persons, whether the rector or vicar is intitled, and in such case the ecclesiastical courts have jurisdiction, though otherwise in the case of the laity, 13 Co. 4. 2 Rol. Abr. 310, 311. 2 Rol. Rep. 55. *Goldsf.* 149. 2 Bulstr. 157, 172. 1 Leo. 59. Where a defect of jurisdiction in the principal matter appears in the libel, prohibition lies after sentence; otherwise where it is only *defectus triationis*, as in the principal case.

Mr. *Fazakerley*, on the other side. As to the tithes, it is plain the demand is founded on the custom, and the recovery must be accordingly, the words of the endowment extending only to the tithes of corn, the offering can no otherwise be due but by custom, and cannot be found on the endowment,

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 {
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 against
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endowment, for there must have been an usage for the payment of it antecedent to the endowment itself, and therefore this right only triable at law; besides, this is not a dispute between ecclesiastics only, the defendant below is a layman, and it is not sufficient that a question arises in this case whether the rector or vicar is entitled to the payment. Prohibition lies here, after sentence as well as before, 2 *Salk.* 548. *Carth.* 97.

Mr. *Dennison*, to prove all customary dues triable at common law, cited *Taylor v. Scott*, *Pasch.* 2 Geo. 2. There the libel was by the vicar of *Wakefield* for a customary fee of ten pence for churching women, *Lutw.* 1052. *Salk.* 334. 3 *Keb.* 523, 527. The common law courts are the proper judges of endowments, and what is granted thereby, *Moor* 457 (a). 2 *Ro. Abr.* 335. *Lit. Rep.* 263.

Lord HARDWICKE, *Chief Justice.* As to the offering, there is no doubt but a prohibition must go; and there is no difference between a defect of original jurisdiction, and a defect of power to try the suit below. Prohibition lies as well after sentence as before; I know no case to the contrary, but that of suing out of the diocese, and in that case there is neither *defectus jurisdictionis* nor *triationis*; the person sued there has only a privilege of staying the proceedings against him upon a proper application to the temporal courts, which is waived, and no advantage can be taken thereof after sentence.

As

(a) *Blinco v. Marson.*

As to the statutes which it is insisted gave the spiritual courts a jurisdiction in trying customs upon which those dues are founded, that way of reasoning will prove a *modus* for tithes triable there too, tithes being always mentioned among other customary dues, but that there can be no pretence for.

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As to the point of tithes of agistment, &c. if a special instrument of endowment had been set out under which those tithes were claimed to be due, and it appeared to us they were not included in that endowment, there could be no doubt then but a prohibition must go, because as the demand would appear to us judicially not to be warranted by the endowment, it could only rest upon the custom, and that is not triable there.

The case here is not so strong, because it is claimed *ex dotatione*, generally *ex antiqua consuetudine*; now it is possible those tithes might appear below to be due by some endowment or other; but however, as it is not disclosed by the proceedings below what the sentence was founded on, and it might be one as well as the other, a prohibition ought to go, or otherwise the spiritual courts by this general way of libelling may try customs triable at common law only, without being subject to any restraint by prohibition after sentence is once given.

LEE, *Justice*, the sentence given in this case no objection at all to the granting a prohibition, as to the tithes for agistment, &c. I doubt whether we can now grant a prohibition, because it does not appear

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appear but that the sentence might be warranted by some endowment or other, the inconvenience of suffering such general allegations in libels seems not so great as apprehended, because the party may immediately apply for a prohibition when the spiritual courts begin to proceed against him upon the custom.

As to the offering, that being a thing merely customary, is not within their conuzance; the statute cited in maintenance of the jurisdiction below impowers the spiritual courts to proceed and give sentence, as well for customary dues as tithes; but still that is subject to trials of customs according to the course of common law, and if the custom is found in favour of the person who libels, then a consultation goes, and they may give sentence, and execute the authorities which are given by those acts of parliament.

LORD HARDWICKE. What was said by my brother *Lee* about a prohibition not going after sentence in this case as to the demand for tithes, seems very material; let there therefore be a declaration, that this matter may come properly before the court by demurrer.

The KING *against* MAYOR, &c. of *Shrewsbury*.

Of the certainty required in a return to a mandamus.

A MANDAMUS having been granted to restore *Corbett Kynaston*, esq. to the office of alderman, a return

2 Barn. 317. 394. Ca. Temp. Hardw. 295. 377. 1 Stra. 1039. 4 Bro. P. C. 271.

return was made to it, in which, among other things, this part of the charter is set out, which requires every alderman to be resident either by himself or his family, within the borough or suburbs, unless in case of the plague or other contagious distemper; then the return sets out that *Corbett Kynaston* had not been resident either by himself or his family for three years before the 2d February 1732; the mayor and a majority of aldermen and common council met upon corporation-business, and then took into consideration this non-residence of *Corbett Kynaston*, and removed him from his office for such non-residence.

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Mr. *Strange* objected to the return; first as to the merits: that it is said there was no plague or other contagious distemper in the borough or suburbs, whereas that clause ought to receive a larger construction, that if there was a plague in any other part of the kingdom, it should excuse his non-residence; that it would be an act of the greatest cruelty to require his continuation there until the plague was got among them, when possibly he might be seized with it, or find a reception in any other place very difficult.

Secondly, it does not appear to be a regular assembly at which he was removed; it is said only at a meeting of the mayor and major part of the aldermen and common council duly assembled. Now, as this was not the common and ordinary business of the corporation, which is directed by prescription or charter to be done upon a particular day, a general summons of all the resident members was necessary

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BURY.

necessary to make this a regular assembly. In the case of the *King v. Strangeways & Bull, Hill. 1 Geo. 1.* it was held the majority of a corporation cannot proceed on any such special business unless there be a general summons; the word *duly* in this case is not sufficient, that is a matter of law; the fact ought to have been specially stated, that the court might judge of the regularity of the meeting: in conviction it is not sufficient to say, A. B. not being duly qualified killed game, &c. but the facts by which he appears not to be duly qualified must be set out.

Thirdly, though it does appear by the return *Corbett Kynaston* was not resident, and therefore no personal notice requisite to be given, in order to defend himself, yet there ought to have been some public notice or other: In proceeding by way of attainder, the party has always time given him to come in; so in cases of outlawry, there are always proclamations: In *Dr. Bentley's* case, want of summons held fatal upon a return to a *mandamus* to restore him to his academical degrees:—In serjeant *Whitacre's* case, *Salk. 434.* want of summons was indeed held to be cured by appearance, but no pretence that the removal would otherwise have been regular.

1 Barnard
192, 388,
451.
2 Stra. 912.
2 Barnard 9.
Fort. 298.
Fitzgib. 107,
305.
4 Bro. P. C.
41.
17 Vin. 155.
ca. 13.
1 Burn's
Eccl. Law,
324.
Ante, 31.

Mr. *Parker* on the other side. The return pursues the words of the charter; that there was no plague, &c. in borough, &c. and that sufficient: the word *duly* is a word of sufficient allegation, is a matter traversable, and must now be taken to be true.

No

No summons is necessary, it appearing *Corbett Kynaston* was not resident in the corporation; so determined in serjeant *Glide's* case, *Show.* 364; and in this respect the principal case distinguishable from those cited.

Lord HARDWICKE, *Chief Justice.* There can be no pretence that a plague in any other part of the kingdom would excuse his absence. In serjeant *Glide's* case, it was not pretended any public notice was requisite; and though *Holt*, Chief Justice, differed from the other three judges in that case, yet it was upon a matter of form only, that it did not sufficiently appear he was absent so as not to be entitled to notice. As to the objection to the word *duly*, in pleading this would be sufficient, and the special manner of summoning, &c. would come in evidence; and no case is cited to prove this wrong in a return: the only doubt with me is, it is said the mayor and major part of the aldermen, &c.; it seems to me it should have been the mayor, aldermen, &c. for the act of a mayor and the majority of a corporation is the act of the whole; and it should have been set out, not as it was in fact, but according to its legal operation.

PROBYN and LEE concurred with the Chief Justice in all but the last point, who seemed to think the return good in that likewise.

1733.

The KING
against
MAYOR,
&c. of
SHREWS-
BURY.

1 *Show.* 258,

364.

4 *Mod.* 33.*Comb.* 197.*Holt.* 169,

435.

12 *Mod.* 27,

251.

1 *Ld. Raym.*

223.

Curia.

The act of
the majority
of a corpora-
tion is the
act of the
whole, and
should be
pleaded ac-
cording to
its legal op-
eration.

1734.

Easter Term,

7th Geo. II. 1734.

The KING against GIBSON.

Upon a motion for a new trial in a criminal case, the defendant must be present.—

When an instrument set out in *hac verba* is clearly proved to be forged, that is sufficient to support the verdict,

though the

purport of it may have been stated somewhat differently. 2 Barnard 412, 418. 2 Stra. 968. S. C.

THE defendant having been convicted of forging a note, upon a motion for a new trial, it was objected on the part of the crown, that no such motion could be made in the absence of the defendant, any more than a motion in arrest of judgment, which seemed to be the opinion of the court. And Lord HARDWICKE the next day mentioned the case of the *King v. Lull, Mich. 7 W. 3.* which was an information for perjury, and the *Queen v. Ridpath, Pasch. 12 Anne (c)*, which was an information

(c) This case is reported in 10 *Mod.* 152, but takes no notice of the rule abovementioned, and 2 *Barnard.* 418, says it was not thought necessary to bring up *Gibson*, for his being in custody was

tion for a libel, in which case it was determined there was no difference between moving in arrest of judgment and for a new trial as to that purpose, and Lord HARDWICKE directed this to be observed as a settled rule for the future.

1734.
The KING
against
GIBSON.

This same motion being regularly made another day, the case appeared to be this: the defendant was convicted of forging a note before Lord *Hardwicke* in London.

The indictment sets out, that the defendant forged a note, dated 30th. June 1713, under the hand of Lady *McCarthy*; the words were, importing to be a writing whereby she acknowledged to have received and borrowed of the defendant, and that he had *laid out and expended for goods for her use*, to the amount of 221l. 12s.; then the indictment goes on, the tenor of which note or writing is as follows; then the note is set out in *hac verba*, which acknowledges the receipt of money by the Lady, other money laid out and paid for her, and for goods before delivered for her use, amounting to the same sum.

E 2

The

was sufficient; however, I conceive the uniform practice is conformable to the rule laid down above, and was observed in the following cases in the King's Bench in *Ireland*. *The King v. Griffith*, T. 28 G. 3. *The King v. Portland*, E. 32. G. 3.; and the *King v. Rowan*, H. 34. G. 3. *MS. Ca.* In the latter case the court committed the defendant immediately after verdict, which, though it met with some opposition, appears to be warranted by *Strange's* report of the *King v. Gibson*, for the court say, "Even when the verdict was brought in they would have committed him, had he staid in court."

1734:
 The KING
 against
 GIBSON.

The exception taken to the indictment was, that here was a repugnancy between the case set out as the purport of the note, and the tenor of it; for the purport supposed money lent, money paid for the Lady's use, and other money paid for goods for her use to be the consideration of the note; whereas it appears by the note itself, that part of the consideration of it was the sale of goods to her by the defendant, which must be taken for the meaning of the words *goods delivered*.

LORD HARDWICKE informed the court what were the reasons which induced him to over-rule the objection, which was likewise taken at the trial.

First, that the words "before delivered" might as well be construed to mean money advanced by the defendant to pay for goods delivered by a third person to the lady, as goods sold and delivered by the defendant himself to her, and by that construction money paid for goods for her use, and for goods delivered to her would mean the same thing.

Secondly, that suppose this was to be considered as a variance; yet as the note set out *in hæc verba* was clearly proved to be forged, that was sufficient to warrant the verdict, there being no necessity that every thing charged in the indictment should be proved; but a proof of the most material fact, as there was in this case, was all that was necessary.

Thirdly,

Thirdly, that what is set out as the tenor of the note is the fact charged in the indictment; and what there is mentioned as the purport, &c. was matter of reference and collection of the jury, and therefore any failure therein would not vitiate.

1734.
The KING
against
GIBSON.

The court unanimously concurred with the Chief Justice, and the motion denied.

DAY *against* SEARL.

MR. *Draper* moved for a prohibition to the court of admiralty to stay a suit there for mariners wages, upon a suggestion that the contract between the mariners and master was by writing under hand and seal, and affidavit made of the execution thereof by one of the subscribing witnesses: upon shewing cause by Mr. *Marsh*, he cited 3 *Lev.* 60. in contradiction to the authority in *Salkeld* 31. He insisted, that prohibitions were intirely in the discretion of the court, *Salk.* 33.; that the statute of the 2 *Geo.* 2. requiring all contracts between masters and mariners to be in writing, it would be very hard if any imposition by the master upon the mariners in prevailing upon them to set their seal, should deprive them of that remedy which they would otherwise have of recovering their wages in the admiralty office.

The admiralty court have no jurisdiction over a mariner's contract which is under seal.
2 *Barnard.*
419.
2 *Stra.* 968.
Cun. 32. S. C.
4 *Burr.* 1944.
3 *Term Rep.* 467.

Mr. *Draper.* The case 3 *Lev.* says only charter-party, which might possibly be between the master and owners, and then not applicable to the present case. This contract appears to have been under hand

1734.

DAY
against
SEARL.

hand and seal between the master and mariners, and they having accepted of him as their paymaster they cannot have recourse to the owners; as the suit below was, but the master only is chargeable. *Granham v. Bennett*, Mich. 2 Geo. 2. upon a motion for a new trial, the case was, the master of a ship bespoke goods for the ship, and gave his note for the payment of the money. It was held that the merchants by accepting the master as their payer, had by the note given, disabled themselves from recovering against the owners, the 2 Geo. 2. not material, that requiring the contract to be in writing only, and not under hand and seal.

Curia.

Lord HARDWICKE, *Chief Justice*. It seems clear that the contract entered into between the master and mariners will not deprive them of any remedy which they could otherwise have in the admiralty court. The 2 Geo. 2. requires such contract to be made and entered into between, &c. and any right which they had of recovering before, is saved by that act. I always thought that wherever there was any contract by deed, or where there were any covenants other than the usual ones, the court of admiralty had no jurisdiction: and in the present case, here were covenants for the payment of wages which are not usual, as a covenant on the part of the mariners, that if they were not capable of performing the voyage and doing the business of the ship, they would deduct so much of their wages as two of the officers of the ship should think reasonable; that if they carried goods of their own without the privity or consent of the master, or if they left their own ship and went aboard any of the king's

king's ships in his service (a privilege expressly allowed by the 2 Geo. 2.) that they should forfeit their wages; and the contract is also by deed.

1734.

DAY
against
SEARE,

The other judges being of the same opinion, the rule for a prohibition was made absolute.

WAINWRIGHT *against* BAGSHAW.

Mr. *Abney* shewed cause why a prohibition should not go to the spiritual court of *Litchfield* to stay a suit there against the now defendants church wardens, to which they pleaded an allowance of their accounts by the minister and a great majority of the parishioners and inhabitants, and that plea refused below. He insisted the plea did not pursue the canon, being the 89th of those in 1603, that requiring it to be before the parishioners and inhabitants; whereas a mere inhabitancy in a parish will not give any right to a person to concern himself in allowance of the accounts. He insisted there were many extravagant items in the accounts, such as ought not to be allowed in justice to the parish, which they were ready to verify by affidavit, and that this was the only remedy they had of setting this matter right.

Where church wardens have accounted, they cannot be cited before the ordinary.
2 Barnard. 421.
2 Stra. 974.
Cun. 33.
Andr. 11.

Mr. *Strange* on the other side, insisted that after an allowance of the accounts by the minister and the parishioners, the spiritual court had no jurisdiction, however extravagant the charge might be upon the parish, and cited Dr. *Prideaux*, Of the office of church wardens, 103.

Mr. Den-

1734.
 WAIN-
 WRIGHT
 against
 BAGSHAW.

Mr. *Dennison* cited the case of *Nutkins* church warden of *Hammersmith* v. *Robinson & Clarey* in the Exchequer, *Michaelmas*, 1 Geo. 2. and the case of *Hawton* church warden of *St. Alban Woodstreet* v. *Kendrick* and others, last Easter Term in the same court where it had been so determined, and *Lutw.* 1028.

Lord HARDWICKE, *Chief Justice*.—The jurisdiction of the ordinary extends no farther than to compel the church wardens to come to an account before the minister and parishioners, for he cannot himself take the account, or enter into any enquiry into the reasonableness or the extravagance of the charge, if the parties interested acquiesce in it; and it would be a very absurd thing to suffer that court to proceed, when the sentence against the church wardens can only be *quod computent*, and that has been done already; and should it go again before the parishioners, the accounts might be allowed in the same manner, and the suit prove of no consequence at all.

Parishioners
 and inhabi-
 tants, mean
 such inhabi-
 tants as are
 parishioners.

The words parishioners and inhabitants must be construed conjunctively to mean only such inhabitants as were parishioners.

Rule made absolute.

HARRIS

HARRIS *qui tam* against REELY.

1734-

HARRIS
qui tam
against
REELY.

WRIGHT serjeant moved to stay proceedings in an action grounded on the 15 *Car.* 2. against a butcher for selling living cattle; no affidavit having been made previous to the action brought, that the offence was committed within a year before the time of bringing the action, and in the county where the action was brought, as it is required by the 21 *Jac.* 1. 4.

Rule to shew cause,

On the day of shewing cause, Mr. *Kettleby* said, this being an offence created subsequent to the 21 *Jac.* 1. the method of proceeding for recovering the penalty is not controuled by that act, and so it has been solemnly settled in *Salk.* 372. the *King v. Gaul*, and 373. *Hick's case*; that the statute of *Jac.* 1. is repealed *pro tanto*, that is, as to offences created since that time.

Wright, Serjeant, on the other side: That the statute of *Jac.* 1. disables informers from suing for a penalty in any of his majesty's courts at *Westminster*, unless the offence is committed in that county, but before justices of assize, &c.—Then comes another clause requiring the affidavit to be made. Now the statute of *Car.* 2. upon which this action is grounded, empowering the informer to sue for the penalty in any of his majesty's courts of record, repeals that statute 21 *Jac.* 1. by which they were restrained from suing in the courts of *Westminster*; but

In penal actions upon statutes subsequent to 21 *Jac.* 1. affidavit that the cause of action accrued within a year, is not necessary.
2 *Barnard*
413, 420.
S. C.
1 *Str.* 415.
2 *Term*
Rep. 274.

1734.

HARRIS
qui tam
 against
 REELY.

but that other clause relating to the affidavit stands unrepealed, and must still be complied with in all popular actions, though for offences subsequent to that statute, 21 *Jac.* and that must be taken to be the meaning of what is said in *Salk.* "repealed," "*pro tanto*," that is, repealed as to the locality of such actions, but not as to the method of proceeding.

LORD HARDWICKE, *Chief Justice.* That clause in the 21 *Jac.* 1. with regard to the affidavit, &c. cannot now be construed to extend to actions brought for penalties inflicted by succeeding statutes, the words *being* on the said penal statute which confines the clause to the offences created by acts of parliament then in being, and not by such as have been made since.

The meaning of the words repealed "*pro tanto*," mentioned in *Salk.* must be, that with respect to offences created by subsequent acts, the 21 *Jac.* 1. cannot take place, but is *pro tanto* repealed; and that construction is agreeable to the second resolution in *Hick's case*.

The other judges concurring unanimously, the rule was discharged.

The

The KING *against* RAINSFORD, and others.

1733.
The KING
against
RAINSFORD.

It is sufficient evidence of a private act of parliament having been passed if printed by the king's printer.

Evidence of
a private act
of parlia-
ment.

It was held clearly that the words in the clause of a temporary act, "For ever hereafter," made the provision in that clause perpetual, though in general it was a temporary act only, and Lord HARDWICKE said that was no unusual thing.

A clause in a
temporary
act made
perpetual by
the words
"for ever
"hereafter."

An information, in the nature of a *quo warranto*, will not lie against a justice of peace for acting within a particular franchise within the county of which he is justice; for the justices are constituted to act as well within liberties as without, and the exercise of that authority within a particular franchise is not any usurpation on the crown, for which an information would lie, but the remedy is by action, which will certainly lie though no particular damage is sustained. The case of a sheriff acting within a particular place or franchise is of the same nature with this, by Lord HARDWICKE, Chief Justice. But if justices of the county take upon them to act as justices of a borough within the county by that name, and by the name of the justices of the county at large, there an information will lie, and they may be ousted by judgment of that franchise so usurped, without affecting their authority as justices of the county, which cannot be done in the other case,

Information
quo warranto
will not lie
against a jus-
tice of peace
for acting
within a
franchise in
the county
of which he
is justice.

1734.
 }
 HARRIS
against
 BURLEY.

case, the only authority claimed and exercised by them being as justices of the county at large.

HARRIS *against* BURLEY.

After the judgment of an inferior court affirmed in B. R. a writ of error *coram vobis* will not lie.
 2 Barnard.
 422, 430,
 431. S. C.

Mr. *Benny* moved for leave to take out execution on a judgment in the palace court, removed hither by writ of error, and the judgment affirmed thereon, and since that a writ of error *coram vobis* brought, and cited *Hern v. Busbell*, *Pasch.* 6 Geo. 2. (e) where the same was done.

Mr. *Strange* on the other side. The plaintiff in error cannot assign matter of law and of fact too for error, and they ought not to be precluded from taking advantage of either some way or other.

The case of *Thompson v. Hunt*, *Pasch.* 4 Geo. 2. is the same with the present; there judgment in *assumpsit* in the palace court was affirmed on error brought in this court, a writ of error *coram vobis* afterwards and motion made to stay the proceedings on an affidavit that coverture, the fact now assigned for error, was given in evidence at the trial, and yet a verdict for the plaintiff, and a rule obtained to shew cause, but that rule afterwards discharged.

The case of *Hern* and *Busbell* is clearly distinguishable from this case; for there the coverture was pleaded below, and the court would not suffer the same

(e) 2 *Kely* 105. 2 *Barnard* 253, 260, 262.

same fact to be assigned for error: for if there should be a verdict for the plaintiff in error, that contradiction would appear upon the record, whereas in the present case the general issue of *non assumpsit* was pleaded.

1734.

HARRIS
against
BURLY.

Mr. Parker on the other side. There can be no question but that upon the first writ of error, either error in fact or in law might have been assigned, and therefore the plaintiff in error not prejudiced: It has been often determined that after a judgment affirmed in the Exchequer Chamber upon error there brought, and the record remitted to this court, no writ of error *coram vobis* in B. R. afterwards. 1 *Ventr.* 207. 2 *Leo.* 38. 3 *Keb.* 28, 29.; and he cited the case of *Lambden v. Prettyjohn, Hill.* 12 Geo. 1. when upon such a writ of error brought after an affirmance in the Exchequer Chamber, and the infancy of one of the defendants in the action assigned for error, it was held no such writ of error would lie.

Lord HARDWICKE *Chief Justice.* The plaintiff in error may certainly either assign matter in fact or law for error, but not both; but I do not see why that may not as properly be done as to suffer two different writs of error to lie: a writ of error *coram vobis* lies, when the first is abated by death, and so the party deprived of assigning any error in fact, to remedy which a writ of error *coram vobis* lies, and not where there has been a judgment of affirmance.

At

1734.

HARRIS
against
BURLBY.

At another day Lord HARDWICKE delivered the opinion of the court in this manner: as to the case of *Thompson v. Hunt*, we can no otherwise judge of that than as it appears upon the rules which were made in the cause. The rule was to shew cause why the assignment of errors should not be set aside, but no rule to stay the proceedings on the writ of error.

There is but one modern case in favour of this opinion, and that is in *Salk.* 337. (f), but that case as it appears by the roll, and by *Lilly's Entries*, is misreported.

The authorities in the books go upon this distinction, That when the record below is not well removed, as by a variance between the writ of error and the judgment below, &c. there the party must bring a new writ of error; but where the record is well removed, and the writ of error is abated by the death of the parties, or the plaintiff in error is nonsuit, there a writ of error *coram vobis* lies, but never after a judgment of affirmance.

There is but one old authority which I can find to the contrary, and that is in 1 *Re. Abr.* 754 *Plac.* 15. and the case is manifestly ill reported: the book says, that after a judgment of reversal in the King's Bench in *Ireland* of a judgment obtained in the C. B. and that judgment of reversal in *Ireland*

(f) *Winchurch v. Belwood*, *Lil. Ent.* 278. S. C. There appears also to be a considerable difference between these two books as to the time in which the case was determined; *Lilly* dates it *Hil.* 3 & 4 *Jac.* *Salkeld* dates it *Pasch.* 4 *W. & M.*

land reversed in the King's Bench in *England*, and that the judgment given in C. B. in *Ireland* shall stand, That a writ of error *coram vobis* may afterwards be brought in the King's Bench in *Ireland* of the judgment obtained in the Common Bench there. Mr. *D'Anvers* supposes the writ of error *coram vobis* should be said to be brought in the B. R. in *England*, and he is certainly right; but still that will not do. This same case is also reported in *Yelv.* 117. (g), and by that it appears the first writ of error in the King's Bench in *Ireland* was discontinued, and that was the reason a writ of error *coram vobis* lay in B. R. in *England*: because in the B. R. in *Ireland* there was no judgment of affirmance or reversal of the first judgment there.

1734.

HARRIS
against
BURLEY.

N. B. Mr. *Strange* said, the present case was distinguishable from any cited, because the writ of error was brought by the *feme* only, and the writ of error *coram vobis* by the *baron* and *feme*, and therefore this was the first opportunity the baron had of assigning this matter for error; but said by Lord HARDWICKE, that made no difference.

Agreed that writs of error *coram vobis* are not within the statute, which requires bail on writs of error.

Writs of error *coram vobis*, not within the statutes requiring bail in error.

Rule made absolute.

(g) *St. John v. Commyn.*

DOBBS

1734.

DOBBS
against
PASSER.

DOBBS against PASSER.

A regular
judgment in
ejectment set
aside to have
the merits
tried.
2 Stra. 975.
2 Barnard
431. S. C.

DECLARATION in ejectment was delivered the 3d *January*, and judgment signed for want of defendants appearance on the 16th *February*; the landlord had notice of the judgment: On the 28th Mr. Justice LEE was applied to, That upon payment of the costs the judgment might be set aside, and the defendant let in to try the merits at the next assizes, which were the 6th of *March* in *Essex*. Mr. LEE made an order to that purpose which was not complied with.

Upon shewing cause by the plaintiff why judgment should not be set aside, it was admitted to be the practice of the court in all cases except ejectment, that where a judgment had been obtained, though strictly regular, yet if there could be a trial had without any prejudice to the plaintiff, as where no loss of time, &c. the court would set aside the judgment, and order the merit to be tried; but that in ejectment the possession is only changed, and the party is at liberty to bring a new ejectment whenever he pleased.

Mr. *Strange, contra.* Though the Court of Common Pleas always exercised the power of setting aside judgments in the circumstances of this case; yet this court could not formerly do it without consent on both sides. But in the case of the *King v. Glasf, Hill. 2 Geo. 2.* this court came into the same

same practice with the other court, and that has been pursued ever since here.

1734.

DOBBS
against
PASSER.

Formerly likewise it was an answer to a motion for a new trial to say it was in ejectment, which was not conclusive; but of late no regard is had to that answer.

The changing of possession is a thing of very great consequence; it being often difficult for a person though really intitled to an estate to make out his right, and so may fail, whereas he would be under no such hardship if he were defendant, as the plaintiff in ejectment must recover by the strength of his own title.

The court clearly of that opinion upon conference with the judges of the Court of Common Pleas; and said there was no distinction made in the court between ejectments and other actions.

Rule made absolute.

GAMAGE *against* WATKINS.

WRIT of error brought here of a judgment in an action for three guineas in C. B. the judgment for 14l. debt and costs, and upon action brought against the plaintiff in error on that judgment, he was held to special bail.

Defendant not held to special bail in an action upon a judgment, where the original action did not require bail.
2 Stra. 975.
2 Barnard
434 S. C.

And Mr. *Dennison* moved that the plaintiff in error might be admitted to imparl to the action

F

pending

1734:
 DAMAGE
 against
 WATKINS.
 1 Barnard.
 22.

pending the writ of error, and might be discharged on common bail.

Mr. *Strange*, *è contra* cited *Chambers v. Robinson*, *Mich. 1 Geo. 2.* where it was determined that special bail might be required in the first action of debt brought on the judgment, though not in any subsequent action brought thereon.

Mr. *Dennison*. In that case no writ of error brought, and until that is determined, it does not appear that any debt is due.

Lord HARDWICKE, *Chief Justice*. It is pretty extraordinary that the pendency of a writ of error should not be a good bar to an action brought on the judgment, as it is a *superfedeas* to an execution. But however, in tenderness to the plaintiff in error, we never compel him to plead, but give him leave to imparle, and there can be no pretence to hold the party to bail while the writ of error is depending.

PROBYN, *Justice*. It is a constant rule, that no bail is required in a debt on a judgment where it could not be required in the original action, which appears here to have been but for three guineas, though the demand is now swelled up to 14l.; which was agreed to by the *Chief Justice*, who said, at that rate bail will be given for costs, which ought not to be (b).

CAREY

(b) But in the case of *Lewis v. Pottle*, 4 *Term Rep.* 570. after a consideration of several authorities, and a conference with the judges

CAREY against HINTON.

1734.

CAREY
against
HINTON.

TRESPASS *quare clausum fregit*, &c. the defendant pleads that the *locus in quo*, &c. was his own proper land; the plaintiff replies that it is his estate of inheritance, and his proper lands, and traverses that they were the proper lands of the defendant, and issue joined thereon, and verdict for the plaintiff.

An informal
issue is cured
by verdict.
2 Stra. 973.
2 Kely 153.
2 Barnard.
436, 449.
S. C.

Mr. *Kettleby* moved for a replader, this being an immaterial issue, the words "proper land" not implying any possession in the plaintiff, without which, this action being a possessory one, cannot be maintained, and they will as properly signify a reversion or remainder in fee,

Mr. *Dennison*, this is an informal issue only, and not an immaterial one, and so cured by verdict, 5 Co. *Nicholl's case*, 2 *Bulstr.* 41. *Moore* 464. 1 *Sid.* 289.

N. B. The meaning of the plea *liberum tenementum* is, that the defendant is seized in fee and has a right to enter, and the possession of the plaintiff is admitted by such plea,

F 2

Mr. *Strange*

judges of the Common Pleas, a contrary rule was adopted; and it is now settled, that a defendant may be held to special bail in an action on a judgment for 10l. for damages and *costs*, though the original debt alone were under 10l.

1734.

CARRY
against
HINTON.

Mr. *Strange* at another day. This defect, if any, is cured by verdict, 5 Co. 43. *Salk.* 365. *Yelv.* 227.; and the case of *Tateman v. Mufion*, *Trm.* 1. Geo. 1. In trespass the defendant pleads that A. was seized and demised to him, and then prescribes for a way; upon a motion in arrest of judgment, after verdict, it was objected that the word *seisitus* might as well mean an estate for life as in fee, and if it be construed for life only it will be bad, as a prescription cannot be annexed to such an estate; but this defect held aided by verdict: he cited also 1 Cro. 87. 2 Cro. 679. 2 Saund. 317. *Hob.* 126.

Lord HARDWICKE, *Chief Justice*. The question is, whether this be an immaterial issue, or only an informal one; if immaterial, though the fault lie in the defendant's plea, yet the court cannot give judgment but there must be a repleader; but here seems only to be a defect in form; the defendant here pleads they are his proper lands, by which he claims some kind of property in them or other: the plaintiff replies, and says they are his estate of inheritance, and his proper lands, and not the proper lands of the defendant; and it being found by verdict that they are not the proper lands of the defendant, his plea is falsified, and it appears now he has not any property whatever in him; and therefore the substance and merits of the case seem to have been in issue, and determined by the verdict.

PAGE and PROBYN, *Justices*, of the same opinion, but LEE, *Justice*, seemed to think it a defect not cured by verdict; for though it does now appear

appear the defendant had no property in the land, yet it does not appear the plaintiff had such an immediate interest in the estate under which he could maintain an action for trespass.

1734.
 CAREY
 against
 HINTON.

At another day Lord HARDWICKE gave the resolution of the court. The verdict finds that the close, &c. is, and at the time of, &c. was the estate of inheritance and proper lands of the plaintiff, and not the proper lands of defendant. We are all of opinion that this defect is aided by the verdict, though it would be fatal on demurrer; perhaps it might not have been sufficient to find that these were the proper lands of the plaintiff; but the verdict goes further, and finds that they were the estate of inheritance of the plaintiff, which, in construction, is the same thing as if the party had alleged he was seised in fee or in tail. The words *liberum tenementum* do not by their natural force express a freehold in possession, but they have obtained that meaning by construction, because a precedent interest shall not be intended; and the same rule holds in construing the words "estate of inheritance." The case of *Tateman v. Buston* is a very strong one to support this verdict, and in that case 1 Ventr. 123. was cited, by which it appears that the court will intend in favour of verdicts; but to make this bad, there must be an intendment of a prior interest in some other person, in order to destroy this verdict.

Rule discharged.

DEVENISH

1734.

DEVENISH
against
MERETINS.

DEVENISH *against* MERETINS.

Plaintiff dis-
continuing
an action of
trespass
against a
justice of
peace for an
act done in
the execu-
tion of his
duty, order-
ed to pay
double costs.
2 Barnard.
373, 432,
449.
2 Stra. 974.
S. C.

TRESPASS for taking away a gun from the plaintiff. The plaintiff discontinues by leave of the court.

Baines, serjeant, moved for the direction of the court to the master to tax double costs, according to 7 *Jac.* 1, 5. upon producing an affidavit that the action was brought against the defendant for what he did in execution of his office as justice of peace, under the 5th *Anne*.

LEE, Justice, cited the case of *Catheral v. Cooper*, where in a case of a like nature, a suggestion of the like matter was entered upon the roll as a foundation to entitle the party to double costs.

Mr. Hayward, for the plaintiff, insisting that the fact in the affidavit was otherwise, a rule was granted to shew cause why such suggestion should not be entered, that the party might have an opportunity of controverting the fact:

In this term Lord HARDWICKE gave the resolution of the court.

There are two questions: the first if the defendant be intitled to double costs, under the stat. *Jac.* 1.?

The

The second what is the proper method of awarding them?

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As to the first, though it has been insisted upon that there ought to be a previous conviction of the offender before the justice can justify the taking away the gun from him, that seems not necessary under this act of the 5th *Anne*; the same authority by the same clause being given to lords of manors, who cannot as such convict. It appears plainly by affidavits that this action was brought against the defendant for what he did in the execution of his office as a justice of peace.

As to the second question, no suggestion upon the roll is necessary or proper in this case; all the cases cited where such a suggestion has been entered, are either after verdict, and no certificate by the judge of *nisi prius*, or after nonsuit. In both these cases a suggestion is very proper, because there a judgment is given for the defendant, which is a proper foundation for entering a suggestion afterwards; but in the case of a discontinuance, no judgment at all is given; but both parties are out of the court, and no costs at all can be given in the common case of discontinuance: Indeed when discontinuance is with leave of the court, we always do it upon payment of costs, but the party has his remedy for them on the rule only; the same manner of remedy must be for double costs, and upon payment of them, the plaintiff to be at liberty to discontinue (*i*).

Upon a discontinuance, both parties are out of court.

LUMLEY

(*i*) Where there has been a trial, and it does not appear on the record in what capacity the defendant acted, in case of a verdict for him,

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LUMLEY
against
PALMER.

LUMLEY against PALMER.

A. parol acceptance is sufficient to charge the acceptor.
 Ca. Temp. Hardw. 74.
 2 Stra. 1000.
 S. C. Stra. 648.
 3 Bac. Abr. 64.
 3 Bur. 1663.
 Doug. 247, 296.
 4 Com. Dig. 241.
 4 Vin. Abr. 250. pl. 12.
 12 Mod. 345.
 7 Mod. 87.
 Mol. 280.
 Cowp. 571.
 1 Atk. 612.
 2 Willf. 9.
 1 Term Rep. 269.
 1 Term Rep. 182.
 Espin. N. P. 41.
 Bayley, 60.

ACTION against an acceptor of a bill of exchange, tried before Lord HARDWICKE this term; upon the evidence it appeared to be a verbal acceptance only, which Lord HARDWICKE thought sufficient. The stat. 3 & 4 Anne c. 9. § 5. he said made an acceptance in writing necessary only for the purpose of charging the drawer on protest with damages and interest, and not to bar the party from charging the acceptor; and by no other construction could the 9th section of the act be reconciled. Verdict for the plaintiff, with liberty given to the defendant to move the court.

Darnell, serjeant, moved for a new trial, and cited the case of *Rea v. Maggot*, in the sittings after last term in C. B. where his client was nonsuit, for this objection:—it was agreed that Lord RAYMOND always ruled it in the same manner Lord HARDWICKE did this.

Lord HARDWICKE said it was much to be wished the courts of Westminster Hall were more uniform in their resolutions; especially in cases which occur so often, and which are of such universal concern, and adjourned the determination of it until he had conferred with Chief Justice EYRE.

N. B. The

him, the judge who tried the cause should certify that he was acting in the execution of his duty. *Vid. Grindley v. Holloway, Doug. 307. & in notis.*

N. B. The case of *Erskine v. Murray*, Mich. 2 Geo. 2. was cited, which was an action against an acceptor of a bill of exchange. Demurrer to the declaration, because the acceptance was not laid to be in writing, and the objection over-ruled.

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against
PALMER.
2 Stra. 817.
2 Ld. Raym.
1542.

Lord HARDWICKE said he thought that case no authority one way or other in this case; for though an acceptance in writing should be necessary, yet it need not appear on the declaration, but it would be sufficient to give it in evidence, which construction has prevailed on the statute of frauds in regard to things required to be in writing.

Adjourned (k).

The KING against The BISHOP of LITCHFIELD.

MANDAMUS granted to the bishop of *Litchfield* to license one *Rushworth*, who had been elected by the inhabitants of the city of *Coventry* usher of a free grammar school there founded in the reign of *Henry 8.* by Mr. *John Hales*.

A mandamus to a bishop to license a school-master:—return that a *caveat* had been entered, with articles an-

To

nexed, and that he was proceeding to enquire into the truth of them, is good, by way of temporary excuse, 2 Stra. 1023. 2 Barnard. 365. 428. S. C.

(k) There is no further account of the case in this collection, but the judgment of the court appears in 2 Stra. 1000. and *Ca. Temp. Hardw.* 74.—In 1 Atk. 612. Lord Hardwicke cites this case of *Lumley v. Palmer* as having been determined after a conference with the judges of the Common Pleas.

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 The KING
 against
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 of LITCH-
 FIELD.

To this mandamus the bishop returned, that by the ancient canon law the power of licensing schoolmasters belonged to the ordinary; then the canons of 1603 are set out, the 77th of which requires such license to be had, and that *Rushworth* is a person in holy orders; that a great many persons who are electors were dissatisfied with his election; that applications had been made to the bishop by way of petition, and affidavits to suspend the granting him a license until the next visitation, when they would make it appear he was a person of a very scandalous and profligate life, and very unfit for the education of children; that at the visitation a *caveat* was regularly entered against granting such license; that *Rushworth* appeared thereon, and the articles of complaint were exhibited against him, which in the return the bishop sets out *in hæc verba*. Then the bishop says, he has not refused to grant him a license, but has only suspended the granting of it, until he has received satisfaction whether he is a person proper to be licensed or not.

Birch, Serjeant, against the return. The allegation that by the canon law the ordinary has a power to compel schoolmasters to take a license as a qualification to teach school, must be proved on the other side. It does not appear what the nature of the affidavits is, nor that they were sworn before a person properly authorized to administer an oath, as is necessary, *Latch.* 39, 133. The strictest certainty is required in returns, *Salk.* 432. It does not appear that *Rushworth* was summoned to answer the charge before the license was refused, which is necessary

necessary in all cases; *The King v. Dr. Bentley* (1); held there could be no suspension or degradation without a previous summons; the articles exhibited against him are not material, there being no sentence therein.

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Mr. Parker on the other side. *Mandamus* lies not for such an office as this, *Style* 457. (m), 1 *Sid.* 40. (n), 1 *Keb.* 5. In the case of *Vincent v. The Bishop of London*, *Trinity* 13 Geo. 1. in the Exchequer, that of *Fulton v. Reynolds*, *Mich. W.* 3. was cited, where it was determined that upon the ordinary's refusal to license a lecturer, a *mandamus* lies not, but the remedy is by appeal.

He cited then several authorities from the canon law in proof of the ordinary's power of licensing, and 23 *Eliz.* 1. § 6. 1 *Jac.* 4. § 9. 13 & 14 *Car.* 2. 4. as so many parliamentary recognitions of that right, 2 *Lev.* 222. The ordinary may punish for teaching without license.

Corry v. Pepper.

The incertainty of the return with respect to the affidavits not material; for it appears that this matter is depending in a proper court, and until it is determined no *mandamus* lies, 5 *Mod.* 374. Sir Rich. Raines's case (o), *mandamus* lies not to compel the granting probate of a will, while it is in a controversy below, *Farr.* 143. *Mandamus* refused to

(1) 2 *Stra.* 912. 2 *Barnard* 9. *Fort.* 202.

(m) *The Protector v. Craford.*

(n) *Stamp's* case.

(o) 1 *Salk.* 299. 3 *Salk.* 162, 233. *Carth.* 457. 12 *Mod.* 205. *Holt.* 310. 1 *Ld. Raym.* 361. 3 *P. Williams*, 337.

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to admit a lecturer, it appearing the right was in controversy, and in a proper method of determination.

The ordinary in this case acts judicially and not ministerially, and in such case a *mandamus* lies not. This like the ordinary's power of examining a presentee to a living, and he is the sole judge of his qualifications, 15 Hen. 7. 8. 5 Co. 57 (p).

LORD HARDWICKE, *Chief Justice*. There are several things considerable in this case: first, with regard to the ordinary's power of compelling schoolmasters to be licensed; secondly, whether he acts *judicially* or *ministerially* in this case? thirdly, whether sufficient matter be disclosed to the court to induce them to suspend the granting a peremptory *mandamus*?

As to the first, it is pretty extraordinary how the keeping a grammar school should be matter of ecclesiastical conuzance; many authorities have been cited from the canon law in maintenance of that power, but that is not sufficient, unless it appeared those canons had been received. The canons of 1603, are not obligatory on the laity, as they have never been confirmed by act of parliament: but however that is not material here; this being the case of a clergyman.

If the bishop acts *judicially*, a *mandamus* lies not to compel him to grant a license, but only to determine

(p) *Specot's case*.

termine the one way or the other, as we often grant them to give sentence generally, without directing them what sentence to give; so to give judgment in inferior courts. But if he acts *ministerially*, and it appears to us that the person applying for the *mandamus* is qualified for the office he prays to be admitted to, then a *mandamus* goes, requiring his admission. I should doubt whether he acts in a judicial capacity in this place. The office of parish clerk seems to be much more of ecclesiastical conuzance, yet there the ordinary acts only ministerially, and *mandamuses* are often granted.

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field.

As to the third point it seems very considerable that a *caveat* being entered, and the matter properly depending in the bishop's court, that should be a temporary bar to any *mandamus*. This is much like the case of Sir *Richard Rhaines*.

LEE, *Justice*. Whether teaching school is a matter of temporal or ecclesiastical conuzance has been much litigated, nor do I know whether it has ever been determined. The last time this matter came in question, was the case of *Matthews v. Burdett*, *Salk.* 673. It has been indeed determined to be of temporal conuzance in respect to the penalty inflicted by the 1 *Jac.* 1. 4 *Carth.* 464.; but the question seems not very material in this case; the acts requiring a license to be had, necessarily imply a power in the ordinary of granting such license; and in consequence of that, it seems they have a discretionary power of judging of the qualifications of persons to be licensed: In the case of the *King v. Wallace*,

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v. *Wallace*, Trin. 2 Geo. 1. the like application for a *mandamus* to grant a license to a schoolmaster,

Lord PARKER, POWYS, and EYRE, hold such *mandamus* would lie, PRATT, *contra*; but it appearing the right was in controversy in a proper manner, it was denied until that matter was determined. There are certainly several authorities since that case in *Styles*, that a *mandamus* will lie in this case; of late *mandamuses* have been carried much farther than formerly.

Lord HARDWICKE. I make no doubt but the ordinary has power of judging of the persons; but it is very material whether that is founded on the canon law, or any implied authority by the several acts of parliament. If the first, this court has nothing to do in it, but the party must take his remedy by appeal to some superior ecclesiastical court; but if he derives his power from the temporal law, he must proceed according to the limitations annexed to it, and we are judges whether that power is properly executed or not.

Adjourned (q.)

The

(q) No further account of this case occurs in this collection, but it appears from Sir *John Strange's* report, that the return was allowed, 2 *Stra.* 1023.

This rule, that the pendency of the suit in the inferior court is a sufficient reason to induce the superior to postpone its interference, has been recognized in several cases. The *King* v. Dr. *Bettisworth*, *Andr.* 365. where the *King* v. the *Bishop* of *Litchfield* was cited by the

The KING *against* Doctor BETSWORTH.

MR. *Taylor* moved to supercede a *mandamus* to the prerogative court to compel the probate of a will, *quia erroneè emanavit*, upon producing an affidavit of the proceedings in the court below, whereby it appeared that the will was litigated there; and to prove that the court would supercede a *mandamus* under these circumstances, and not require a return to be made thereto, he cited Sir *Richard Raines's* case, 5 *Mod.* 374.

Lord HARDWICKE, *Chief Justice*. It appears the litigation of the will was subsequent to the time of the

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against
Dr. BETS-
WORTH.

Where the
suit below is
commenced
subsequent to
the applica-
tion for a
mandamus,
the court
will not su-
percede the
writ.
2 Barnard.
420. S. C.

the court. *The King v. Dr. Hay*, 4 *Burr.* 2295. *Lovegrove v. Bethell*, 1 *Black.* 668. *The King v. Rhodes*, 1 *Stra.* 703. *The King v. Philips, Ca. Temp. Hardw.* 241. *The King v. Bowerman*, B. R. *Westminster, East* 1789, which was an application for an information against the defendant for carrying off Miss *Fust*. Upon shewing cause, *Mingay* stated that a suit had been instituted in the ecclesiastical court to annul the marriage between Mr. *Bowerman* and Miss *Fust*, which suit was still depending; and thereupon the court ordered the rule to stand over. *The King v. Westropp* and others, B. R. *Ireland, Trin.* 1792, information against the defendants for a conspiracy, for that they having prevailed upon a young gentleman of the name of *Spread* to spend a few days in their house, gave him a quantity of liquor, and while in a state of intoxication, a marriage-ceremony was performed between him and Miss *W* —. Upon shewing cause, it was stated, that a suit was depending in the ecclesiastical court to compel a performance of a contract of marriage which had been previously entered into between the parties.—The court desired the matter to stand over, with liberty to apply again, in case of any affected delay in the proceedings below. *MS. Ca. Trin.* 1792.

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 The KING
against
 REFIT.

the *mandamus* issued, and in that respect distinguishable from the case cited, as this writ can hardly be said to have issued erroneously, when at that time there was no controversy about the will, and when there is none, a *mandamus* properly lies.

There was a rule to shew cause, which was afterwards made absolute by consent of the other side, and the *mandamus* went.

The KING *against* REFIT.

Indictment
 against a
 clerk of the
 market for
 extorting
 fees.
 2 Barnard.
 436. S. C.

THE defendant having been found guilty of extortion, for insisting on extravagant fees from several tradesmen, and as servant to justice Robt, clerk of the king's market, &c. Mr. *Strange* moved in arrest of judgment, that the indictment was for taking fourteen pence, for examining, marking, and sealing 14 pots; and though the defendant could not be justified in taking any fee for examining, yet it appears by 4 *Inst.* 274. that for marking and sealing there is a fee due, and the offence being charged intire, the judgment is ill.

The Court clearly of opinion, that the defendant being found guilty generally of the indictment, they could not enter into an enquiry of that nature now.

Objection over-ruled.

The

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THE KING
against
The ARCH-
BISHOP of
CANTER-
BURY.

The KING *against* The Archbishop of CANTERBURY.

MR. *Kentley* moved for a *mandamus* to be directed to the archbishop to admit Mr. *John Austis* to a fellowship in All-Souls College, in right of his being related according to the provision of the statutes, the power of supplying this vacancy having devolved to the archbishop as is directed by the statutes, when there has been no election by the college within the time prescribed for that purpose.

But the original statutes not being produced, nor any copy regularly attested, the court denied the motion without entering into the question, whether a *mandamus* would lie or not? And though it appeared by affidavit that application had been made to the college to inspect the statutes and take a copy, and that denied; yet the court said they could give no relief by rule or otherwise, there being no proceeding depending in that court; but the remedy must be by bill of discovery in equity.

Where a college upon a private foundation refuse a copy of their statutes, relief may be had by bill in equity.
2 Barnard.
437. S. C.

The Executors of Low *against* BROWN.

MR. *Miller* moved to enter up a judgment upon a warrant of attorney given to the plaintiff's testator, and cited *Salk.* 117. where leave was given to baron and feme to enter up a judgment on warrant of attorney given to the feme when sole.

An executor cannot enter up judgment upon a warrant of attorney given to his testator.

G

Lord

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The KING
against
ELLAMS.

Lord HARDWICKE. There the judgment entered up by the same person, and the husband is joined only for conformity.

Motion denied.

The KING against ELLAMS.

Amendment
allowed in an
information
quo warranto.

2 Barnard.
402, 440,
445.
Ca. Temp.
Hardw. 42.
Cunn. 39.
S. C.
2 Burr.
1098.
Cowp. 407.
Doug. 114,
115, 376,
710.
1 Term Rep.
782.
2 Term Rep.
707.
3 Term Rep.
349, 657,
749.
4 Term Rep.
228, 457,
689.
Andr. 13,
77, 110,
208, 305,
351, 362,
381, 387,
Vern. &
Geniv. 203.

INFORMATION in the nature of a *quo warranto* against the defendant, as a mayor of *Chester*. The defendant in his plea sets out the charter of incorporation in the time of *Henry 7*, by which it appears that the *citizens* of the city *inhabiting* within the city and the hamlets and suburbs thereof, are to nominate two aldermen, one of whom is to be elected mayor by the mayor and aldermen and sheriffs, and then sets out the nomination of himself by a major part of the *citizens*, not saying any thing of the *inhabitancy*. To this there is a demurrer, and issue taken on the allegations in the plea of his being an alderman, which issue went down to trial, but there was no trial thereon by reason of a challenge to the array.

Mr. *Huffey* moved to amend the plea with respect to the omission of alleging the *inhabitancy*; it is no unusual thing for the court to allow amendments even in indictments and informations for misdemeanors, 3 *Cro.* 144.

The

The case of the *King v. Hays* (q), *Hill. 1 Geo. 2.* indictment for forgery, after trial and special verdict found the court gave leave to amend the word *perochia*, and make it *parochia*.

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ELLAM.

These informations are in the nature of civil suits, and by the 9th *Anne* it is expressly provided, that the statute of *jeofails* shall be extended to them. *Wilkes v. Rich.* (r), *Mich. 6 Anne.* Covenant not to act after such a day, and in alleging the breach, it was laid, that he acted *postbac*, demurrer, and after argument thereon, the court gave the plaintiff leave to amend thereon.

Malmbsbury case, *Pasch. 9 Anne* (s), information in the nature of a *quo warranto* against the corporation; a mistake in the name of the corporation pleaded in abatement, and that rectified on motion to amend.

Footte v. Prowse. Mistake in the defendant's name set right after the plea in abatement. *Collins v. Cole*, *Mich. 10 Anne.* There was an amendment in a joinder in demurrer, after a writ of error brought in the exchequer chamber. 3 *Leo.* 347. *Bearecroft v. The Hundred of Burnham Stone*, and a very material case cited there.

Mr. *Bootle*, senior. The *King v. Hughes*, information in the nature of *quo warranto* against the
G 2 mayor

(q) 1 *Ld. Raym.* 1518.

(r) 11 *Mod.* 133.

(s) 2 *Str.* 739. in the margin.

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 against
 ELLAMS.

mayor of *Liverpool*. The defendant's plea stated the charter, which required the election of the mayor to be by the mayor, bailiffs, and burgesses, and to be sworn before the lord mayor and bailiffs: Then the plea sets out, that he was sworn before the mayor, and two other persons then bailiffs, but the christian name of one of the bailiffs was mistaken, *Peter* for *Robert*, which would certainly have been a fatal variance at the trial. The information was at issue, and carried down to trial: upon debating this matter by counsel on both sides, before Lord RAYMOND at his chambers, he gave leave to amend.

Mr. *Strange*. Nothing more common than after demurrer and joinder to give leave to amend a general memorandum, where it appears the cause of action is subsequent to the time of the action brought, *Russel v. Martin*, and *Russel v. Thorpe* (1), *Pasch.* 10 Geo. 1. So when records of *nisi prius* are made up, and the cause carried down to trial; *Duchess of Marlborough v. Windmore*, *Trin.* 1730 (v), the *King v. Charlesworth* (x), indictment for forging a warrant of attorney to confess judgment; leave given to amend a mistake in the warrant on the day of trial, though that was the ground of the charge.

Crookell v. Jones, *Pasch.* 12 Geo. 1. (y), the statute of limitations pleaded in *assumpsit*; the plaintiff replies,

(1) 1 *Str.* 583.

(v) 2 *Str.* 890. 1 *Barnard.* 408, 418.

(x) 2 *Str.* 871. 1 *Barnard.* 342.

(y) 2 *Str.* 374. *Crookell v. Jones*, 2 *Ld. Raym.* 1441.

replics, *quod actio incepta fuit eoli Die*, within the six years. To this there is a demurrer, and after the court upon argument thereon had given their opinion that they ought to have shown that the action was continued down, and have set forth the continuance, the court gave leave to make that amendment, *8 Bos. 273. 29 Pasch. 3 Geo. 2. Dumol v. Aldworth (x).*

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against
ELLARD.

Mr. Bootle, junior, 2 Mod. 167, the plea concluded to the country, which ought to have been with averment after demurrer thereto, amended.

Mr. Parker, on the other side, cited *Hatton v. Walker*, Mich. 3 Geo. 2. (x), where, on the conclusion of the plea it was said, *sed actionem*, instead of *si actionem suam habere debeat*; to this a demurrer, and this mistake assigned for cause: upon motion to amend, the court would not grant it, but being after satisfied that the draught of counsel was right, and that this was only an error in transcribing, the amendment indeed was allowed upon authority of *Brownjohn v. Doily*, Hill. 8 Anne, where in replevin and avowry for rent, the distress was laid to be prior to the time the rent incurred due, demurrer and a *consilium* thereon, the draught of the counsel appearing to be right, the court gave leave to amend.

Lord HARDWICKE, *Chief Justice*. It appears by the words of the 9th Anne, that trials on informations

(x) 1 Barnard. 291. *Dumol v. Aldworth*,

(a) 2 Str. 846. 1 Barnard. 213, 220.

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against
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tions of this kind are to be had in the most expeditious manner, as they are brought to try the right to offices, determinable in a year or other short time, and therefore any attempts to prolong the time of trial, must meet with no encouragement. It would be proper that some satisfaction should be given to the court by affidavit that nothing of this kind was intended here, but that it was a mistake only in the persons concerned in drawing the plea.

As it would be irregular to read any affidavit of that kind on shewing cause, as the present case is, the rule was discharged with liberty to make an original motion for amending another time.

Trinity

1734

Trinity Term,

7th & 8th Geo. II. 1734.

The KING *against* ELLAMS, *supra*.

UPON shewing cause on another rule why this amendment should not be made, it appeared by affidavits on the defendant's part, that in this mistake there was no affectation of delay, but that it was occasioned merely by inadvertency, and the hurry of business the counsel who perused it were in. And to obviate an objection that the loss of a trial in this case was a reason why the amendment should not be allowed. It appeared that an issue was taken on one fact charged in the plea and carried down to trial, and the array there quashed by the defendant, the *venire* being directed to, and

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 against
 ELLAMS.

and the jury returned by, one who was a freeman of *Chester*, and that had issue been joined on the other fact, to which the demurrer was, that would have met with the same fate, as it was liable to the same objection.

Some of the cases cited against the amendment were, *Poph.* 128, 144. *Sid.* 35. *b* *contra*, 1 *Ventr.* 221. 2 *Saund.* 401. *Cro. Car.* 147.

Lord HARDWICKE, *Chief Justice*. This amendment must be grounded at common law, no provision being granted for any such amendment by statute. The practice of the court is much altered in this respect; anciently a party was not suffered to amend after entry on record; the common form of saying on such motions, "All is on paper," is a proof of it; and the cases of amendments are not reducible to the general rules laid down, for,

First, it is said there must be something to amend by; but that rule holds not in amendments before judgment. However after, many cases may be cited to the contrary which have been on these occasions.

Secondly, it is said errors in law are not amendable, but only misprisions of clerks; but it is clearly otherwise, 2 *Saund.* 401. 2 *Ventr.* 221. 2 *Mod.* 167. In *Moslyn v. Tolly*, 3 *Geo.* 1. (b), in the exchequer, action for a nuisance, demurrer to the declaration, and joinder in demurrer; leave then given

given to withdraw the demurrer, and to plead the general issue.

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against
Ellam.

Thirdly, amendments said to be allowable only where no trials have been lost; but I know no case where that has been laid down. A great number of amendments have been allowed after arguments on demurrer, where trials must generally have been lost.

Fourthly, it is said some extraordinary amendments have been allowed, but that has been where the party would otherwise be deprived of his action, and lose his right, as in the case of the *Duchess of Marlborough* against *Widmore* on the statute of limitations; and the case stated in 3 *Lev.* 347. which was an action on the statute of Hue and Cry, which must be brought within a year after the robbery, but sure the loss of an office is of as great consequence, and deserves as much favour.

It is said, this is a criminal suit. I cannot say it is such; it seems so indeed in respect of the fine which must be set on the conviction, but then in other respects, it is merely civil; a relator is to be appointed by statute. Costs are to be paid, and a method directed for the trial of a right, and it seems not to differ from trespass where the defendant is fined.

But supposing it was a criminal suit, that would make no difference. In amendments at common law, there is no distinction between one and the other;

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against
ELLAMS.

The statute
of jeofails
confined to
civil suits.

There must
be probable
error to in-
duce the at-
torney ge-
neral to al-
low a writ
of error.

other; that difference is founded merely on the statute of amendments and *jeofails*, by the words "plaintiff" and "defendant," and therefore it has been confined to civil suits; the question then is reduced to this point, whether this case is under such circumstances as may induce the court to exercise their discretion in ordering this amendment to be made? No trial appears here to have been lost, but the contrary on affidavits. I was very doubtful of granting this amendment, until satisfaction was given to the court, that no delay was intended in the case, which matter is now sufficiently cleared up. Issue in this case might have been joined on the plea, and if a verdict for the defendant, advantage might have been had of this mistake, by writs of error. For though in indictments, it is necessary to give the attorney general some satisfaction of a probable error, in order to obtain his *fiat* for the allowance of the writ of error; yet it is not so when a right is concerned, as in the present case.

The other judges concurred *in omnibus*, but LEE, *Justice*, said he was at first a little in doubt on the distinction taken by *Holt*, Chief Justice, in *Salk.* 50. but said that rule will not hold, as appears by several authorities: 2 *Mod.* 167. is expressly other-
wise.

Rule for the amendment made absolute.

COLONEL

1734-

Colonel
Pitt's
Case.

COLONEL PITT'S CASE.

IN Easter Term, serjeant *Darnell* moved to discharge the defendant out of execution, upon affidavit that he was a member of the late parliament, and that verified by producing the return to parliament, which was dissolved the 18th *April*, and the defendant taken in execution the 20th. It was insisted his privilege intitled him to a reasonable time, *cundo & redeundo*, and that two days could not be looked upon to be such, and cited 2 *Lev.* 72.; upon this a rule to shew cause: and the same term, upon shewing cause, the case was opened thus:—Colonel *Pitt*, being in custody at the suit of several persons who had actions depending against him in common pleas, was removed by *habeas corpus* into the King's Bench prison, at the suit of several persons in actions brought in the King's Bench against him, and there charged with declarations by many of his creditors, who now opposed his discharge,

A member of parliament arrested two days after the dissolution, discharged upon motion, 2 *Stra.* 985. *Ca. Temp.* *Hardw.* 28. 2 *Barnard.* 422, 433, 448. *Cunn.* 16. *Fortesc.* 342. *Com. Rep.* 444. *S. C.*

Mr. *Gapper*, for one of the plaintiffs, who had delivered a declaration to him in custody, insisted, that this method of application for his discharge was improper, for he ought to proceed by writ of privilege, as in *Dyer* 59. That the defendant by removing himself by *habeas corpus* into this court, had thereby waived his privilege, if he had any, and might now be charged in custody.

Mr. *Wynne*, for another plaintiff. The principal case in 2 *Lev.* 72. relates only to peers; but the privilege

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privilege of members during the parliament cannot be denied. All the books say, *durante parlamento*, or *durante sessione*, *Dyer*. 60. 4 *Inst.* 46. An instance of wages allowed for no more than 21 days in the whole, *pro expensis suis veniendo ad parlamentum ibidem morando et inde ad propria redeundo*.

In *Hakewell's Modus Tenendi Parliamentum*, 63, 208. Sir *Thomas Thorp's* case (*b*), who though speaker, was taken in execution during a prorogation of parliament, and could not obtain his discharge when the parliament met again, but they chose another speaker,

The removal of himself by *habeas corpus* is a waiver of his privilege, *Dyer* 33. *Bro. Tit. Privilege* 26. But however, if this privilege be allowable, yet it is no otherwise so than by pleading, *Latch.* 48. *Dyer* 60.

Mr. *Bimby*, for another creditor, cited *Crompt. Jurisdic.* 11. 4 *Inst.* 24, to shew privilege continued no longer than during parliament. He insisted that the defendant had particularly waived his privilege in the case of his client, having desired him to charge him in custody with a declaration, and told him

(*b*) This case is also stated in *Hatfield's Prec.* 1 vol. 29. It was determined in the 31 & 32 *Hen.* 6.; and the opinion entertained of it at a subsequent period, may appear from the expressions of Sir *N. Rich.* who, in 1620, when this case was cited, said, "It is a case begotten by the iniquity of the times, when the duke of *York* might have an overgrown power in it; and therefore I wish it may not be meddled with."

him it would be for the advantage of them both, which was verified by affidavit.

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Mr. *Dennison*, for another. Privilege in this case ought to have been pleaded, and a writ of privilege annexed to his plea, 1 *Sid.* 42. 1 *Keb.* 3, 13. A lord of parliament must plead his privilege, *Sid.* 29. *Vidian's Entries*, 93.

Chapple, serjeant, on the other side. Privilege of members of parliament is a prescriptive right, *Dyer* 60. ; and it never was doubted as to arrest on *mesne* process, whatever it might be in case of an *execution*, *Moor* 75. *Latch.* 150. The statute 1 *Jac.* 1. c. 13. supposes members to be liable to be discharged out of execution in the right of their privilege, and subjects them to be taken in execution when that ceases.

In *Thorp's* case, which likewise appears in *Moor* 346, the time of privilege might be out, for any thing which appears to the contrary. In *Brownl.* 91, no objection there taken to the allowance of forty days privilege before and after, &c. The statute 6 *Hen.* 8. 16. requires the attendance of members to the end of the parliament, and time therefore ought to be allowed after the dissolution of it, for returning to their respective habitations. The law of parliament is part of the law of the land, and must be observed in all courts, *Salk.* 512. This is a proper method of application, without pleading the privilege, and not unlike the discharge upon motion of a person arrested upon Sunday. If

no

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no advantage can be taken but by pleading, the party may be deprived in many instances of that benefit for a long time.

Mr. *Strange*, for the defendant. Some things may be left out of the case; as, that the defendant advised one of the parties to charge him with a declaration, that being immaterial, it not being in the defendant's power to waive his privilege, if he is really intitled to it, as every member of the house, and the public, is interested in it.

It is said he was only charged in custody at the suit of these plaintiffs, and not arrested originally by them, and therefore as to those suits, his privilege will be no protection:—but surely, if the original arrest was wrong and illegal, whatever is done in consequence of that must fail too. It has not been made out to the court that the defendant moved himself by *habeas corpus*, it might be at the suit of some of his creditors, and if so, there is no pretence, that he has done any thing which amounts to a waiver of his privilege.

The principal points are two; the first, whether the defendant be intitled to his privilege? The second, if this be a proper method of claiming it?

It is said, that privilege determines with the dissolution of the parliament; but it is plain, privilege has always been considered as extending further; and as prorogations are not very ancient, it being usual formerly to have frequent new parliaments,

ments, sometimes two or three in a year, such privilege must be supposed to subsist after the dissolution of them.

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The words, *ad propria redeundo*, in 4 Inst. 46. are very material, as it supposes them to be in service of the public until they are returned home. So peers are impowered by *Charta de Forreſta*, *eundo & redeundo*, to kill two or three deer in the king's forests.

I do not find any authority where it is settled, that forty days is the time allowed for privilege; but that a reasonable time is allowed, appears from many books relating to parliaments. *Elſinge's Antient Method and Manner of holding parliaments*, 104. *Sir Thomas Shirley's Case*; and in the same book, 108, *Mr. Martin's Case*; another book called, *The Opinions of sundry learned counsel, Dodderidge, &c. concerning the power and privileges of parliaments*. In the preface to that book, wrote by *Dodderidge*, it appears there is such privilege. A witness is privileged *redeundo*; the same reason holds in the case of a member, &c. I know no precedent of a discharge of a member on motion; but as the whole fact as to his being a member, the time of the dissolution of parliament, and of his being taken, is now disclosed to the court, and admitted to be true, there can be no occasion for putting the party under the necessity of pleading this privilege, and this method of proceeding is agreeable to the practice of the court in many instances.

Lord

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Colonel
Pitt's
Case.A member
of parliament
may waive
his privilege.

Lord HARDWICKE, *Chief Justice*. There can be no doubt but a member may waive his privilege, under his hand, or by submitting to any actions or proceedings therein, and in such cases the house will not suffer him to resume his privilege, unless the service of the house requires his assistance. I desire therefore that it may be laid before the court, Whether the *habeas corpus* was procured at the defendant's instance, or any of his creditors?

Adjourned.

Members of
parliament
privileged
quoad se
redeundo.

At another day, Lord HARDWICKE said, this case had been argued before all the judges in England, except Baron CARTER, at Serjeant's-Inns, as a matter of consequence to the rights and privileges of parliaments, on the one hand, and on the other, to the property of honest creditors.—We are unanimous in opinion, that members of parliament are privileged *eundo & redeundo*, for what time is not necessary for us to determine, it appearing that colonel Pitt was taken no more than two days after the parliament was up, which we think cannot be a convenient time. The great question will be, Whether advantage can be taken of this privilege on motion? Or, Whether it is not necessary to be on record by writ of privilege under the great seal?—All agree that a writ of privilege is proper; and whether the other way is not so too, there is some difference of opinion amongst us: there has been no authority cited of any such discharge on motion.—Let the rule be enlarged until next term, with liberty to the defendant to bring his writ of privilege: if he insists on proceeding in the

the present application, he shall have our opinion upon the matter next term.

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And in the present *Trinity* term, the defendant having applied to the Court of Chancery for a writ of privilege, and some difficulties arising there, for want of sufficient notice to his several creditors at whose suit he was in custody, and the chancellor, and master of the rolls, who assisted on that occasion, not seeming to think very favourably of the application there, he now resorted to the Court of King's Bench for their opinion, as the case appeared on the former proceeding.

LORD HARDWICKE now delivered the resolution of all the judges of *England* to the effect following. After having stated the facts, and repeated the former resolution, he said, all the judges had met again, except DENTON, Justice, who was ill, but had certified his opinion by Mr. Justice LEE: that ten of them were of opinion that the defendant was intitled to his discharge on motion; that REYNOLDS, Chief Baron, doubted; and that Baron THOMPSON was inclined to think he could not be discharged on motion, though he did not give any positive opinion (c).

There are two considerations in this case, first, How the law stood as to the matter before 13 W. 3. c. 3.?

H

Secondly,

(c) Sir John Strange says Mr. Baron Thompson was strongly against it.

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Case.

Secondly, Whether that act has made any alteration?

1 Black.
Com. 166.

As to the first, all the judges are of opinion, that before that act the regular way was to proceed by writ of privilege under the great seal, for the discharge of any member of parliament, by any of the courts of Westminster-Hall, not entering into any inquiry as to the discharge of any member by the house of commons itself, sitting the parliament. This writ of privilege was a *superfedeas* to the action, and was so pleaded, the conclusion being always *si in placito predicto ulterius procedere vel cognoscere velit aut debeat*, as it appears by *Prynne's Register of Parliamentary Writs*, lib. 1. folio 660.

As to the second point, ten of the judges are of opinion that two alterations are made by the act.

First, That it has taken away the old plea of privilege.

Secondly, That it has made the execution of the process on any member irregular and illegal.

The ft. 13
W. 3. has
taken away
the plea of
privilege.

As to the first, the act is intituled, An act for preventing any inconveniencies that may happen by privilege of parliament. The first clause of the act impowers any creditors to bring actions against any member, &c. immediately after any prorogation or dissolution of parliament, or after any adjournment for fourteen days; this clause is in abridgment of the privilege of parliament, as it stood before this act; then comes a proviso only privileging

privileging the persons of members from arrest, and during the time of privilege; and then follows the enacting clause which gives a remedy of proceeding against members by summons and distress infinite, &c. after prorogation, &c. which concludes with these negative words "shall not arrest or imprison the body," &c.

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Colonel
Pier's
Case.

The provision therefore made by that act is, that after a prorogation, &c. a member may be proceeded against during the time of privilege, the effect of which is, that a member cannot now plead his privilege to the action, that being taken away by the act; To what then can he plead it? Not to the *latitat*, *capias*, &c. by which he is taken, in avoidance of such process. I know no instance where such plea is allowable, unless it be expressly given by act of parliament, as in the case of the insolvent debtors act, and in the case of *Widdrington v. Charleston (d)*, Hill. 11. Anne. In an appeal, held by Lord PARKER, where a man is brought in by erroneous process, or one process mistaken for another, that matter is not pleadable in avoidance of the process.

If Mr. PIER then is intitled to his privilege from arrests, and cannot plead as before the act, what other remedy can he have than by motion, and that the more strongly here, because the statute of the 13. Will. has made this arrest of his person irregular?

And made
the arrest
void.

H 2

Two

(d) This case is in 10 *Mod.* 86, but the report takes no notice of the point mentioned by Lord HARDWICK.

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Two things are done by this act: first, it has instituted a new method of proceeding, either by summons, or distress infinite, or by original bill and summons, attachment and distress infinite.

Secondly, it has provided expressly against the arrest of his person, so that now this privilege from arrests is become part of a public act of parliament, which we are obliged to take notice of, and it needs not to be certified to us by plea, as before the act, being then of a private nature only, though now indeed we cannot take notice of the person's being a member of parliament but by matter of record, which has in this case appeared to us by Mr. Pitt's return to parliament, which is the proper method, as appears by Sir *Richard Temple's* case, in 1 *Sid.* 42.

Keb. 3, 13,
16, 727.

Raym. 12. and in several places in *Keble*, who, though very far from being an accurate, is a pretty good register (e). And this discharge on motion is no new thing, as appears by *Lady Huntington's* case, in 1 *Ventr.* which was before the acts, and yet privilege of peerage is as properly pleadable as this privilege, Lord *Banbury's* case, in *Salk.* 512. I have a good manuscript report of that case, where it is said by *HOLT*, *Chief Justice*, if it had appeared he had been summoned to parliament, and there was no dispute as to identity of the person, that he should have been for discharging him upon motion; and Lord *Mordington's* case (f), in C. B. when Lord KING presided there, who being a Scotch

1 *Ventr.* 298.2 *Ld. Raym.*
1247.

(e) I have heard Lord KENYON say, that *Keble* was a feeble reporter.

(f) *Forbes.* 165.

Scotch peer, who are all since the union entitled to the privilege of peerage, though not members of the house of peers, was discharged from an arrest, and the bailiff compelled to make his submission. This therefore brings it to the common case of an arrest of a common person who ought not to be arrested; persons arrested on a Sunday contrary to 29 Car. 2. are discharged on motion (g).

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The

(g) Ir. ft. 7. W. 3. c. 17.—In the case of *Halliday v. Crowe*, a question arose, whether a party could be arrested upon a Sunday, by virtue of an attachment awarded against him for a contempt.—Three attachments issued from the equity side of the Exchequer in Ireland against *Crowe*, one for not paying costs, a second for not furnishing a rent-roll pursuant to order, and a third for intermeddling with the rents of the estate mentioned in the pleadings after a receiver was appointed:—the first was directed to the sheriff of the county of *Dublin*, the others to the pursuivant who arrested Mr. *Crowe* upon a Sunday, in *January 1790*: an application was made to the Court of Exchequer to discharge him, inasmuch as he was arrested contrary to the stat. 7 W. 3. This was opposed upon the ground, that the attachment was for a contempt, which was a *constructive breach of the peace*, and therefore within the exception of the statute.—The Court of Exchequer refused the motion, and Mr. *Crowe* appealed from the order then made.—Lord FITZGERBON, C. said it was not necessary to enter into the question upon the construction of the statute of *William*.—The Court of Exchequer were not bound to discharge the man, but to leave him to his remedy at law:—under the circumstances of the case, his Lordship thought the Court of Exchequer had acted right, and therefore he was of opinion the appeal should be dismissed.—The Lords concurred unanimously, and dismissed the appeal without hearing counsel for the respondent. MS. Ca. H. L. in Ireland.

Note.—

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ary in the
court to re-
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tion, or on
pleading the
privilege.

The case of ambassador's servants under the 7th Anne is the same; so in the case of any irregularity in the service of process, under the statute for preventing frivolous, &c. So that we think this discharge of Mr. Pitt proper, by force of those negative words in the 13 Will. 3. and we hold it likewise to be a matter of discretion in the court, whether they will relieve on motion or pleading in case of privilege. There are similar cases to the present. The arrest of a juror, witness, or a party attending his own suit; for that privilege is the privilege of the court on which they attend: anciently writs of privilege

Notes.—In less than a fortnight after the above decision was made, *S. Pierpoint Hewitt*, pursuant of the Common Pleas, was brought to the bar of the House of Commons, in custody of the serjeant at arms, for a breach of privilege, in arresting a member.—His defence was, that he made the arrest by virtue of an attachment for a contempt of court, which had been considered a constructive breach of the peace.—The House expressed great indignation at this breach of privilege, and upon the motion of the Solicitor-general, the pursuant was committed to Newgate.

Vid. 1 Atk. 35. *Ex parte Whitechurch*; the King v. Wilkes, 2 Will. 151.; the King v. Stokes, *Contemp.* 136.; the King v. Myers, 1 Term Rep. 285.; the King v. Pickerill, 4 Term Rep. 809. The case of the King v. Wilkes is frequently cited, to shew the opinion of Lord CAMDEN, that a libel is not a breach of the peace:—Great and respectable as the authority is, it is not altogether unimpeached; for in *Griffith v. Carlton*, which was an action of false imprisonment, tried in the Exchequer, at the sittings after Trinity, 1791, a verdict was found for the plaintiff by consent, subject to the opinion of the court, upon the following point:—"Whether a magistrate is justifiable in arresting a man charged with publishing a libel, before indictment found?"

YELVERTON,

privilege were sued out in such cases, as appears by *Rastall*, Title *Privilege*; and though that be a proper method, yet the constant practice now is to discharge

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YELVERTON, *Chief Baron*. "I have always understood it to be the law, that a magistrate might arrest a man for a libel even before indictment found:—it is considered to be a *constructive breach of the peace*, and as such, a magistrate might arrest for it; at least it has been the practice of magistrates in this country, ever since the English laws were introduced.—The only case that can raise a doubt is a loose saying of Lord CAMDEN in *Wilkes's* case, which however was a very different case from this. I was not present at the argument upon that case, but I was in London at the time, and for some months after:—it was a general subject of conversation, and the expression put into Lord CAMDEN's mouth by Serjeant *Wilson*, never was mentioned. A friend of mine, the late *Dominick Trant*, a very laborious and accurate note-taker, sent me a report of that case, which certainly does not contain the expression in *Wilson*.—However, as it appears in the book, and from the respect I have for that venerable judge, Lord CAMDEN, I will not undertake to determine this case at *Nisi Prius*, but reserve it for the determination of the court of law." MS. N. P. Ca.

The case has never been brought forward since, that I have heard of, the plaintiff having probably acquiesced in the opinion of my Lord Chief Baron.—However, in defence of Serjeant *Wilson*, I beg leave, with most profound deference, to suggest, that the case carries intrinsic evidence of the accuracy of the report:—there were three grounds urged in behalf of Mr. *Wilkes*, why he should be discharged; two were ruled against him, the third was ruled in his favour, *viz.* that he was arrested for a libel; that a libel was not a breach of the peace, and therefore he was intitled to his privilege. The event shews what must have been the reasoning of the Court, for otherwise Mr. *Wilkes* could not have been discharged. The case then must stand upon the authority of Lord CAMDEN, taking for granted that the report is correct.—But I cannot omit observing, that the practice in *Ireland* is as stated by my Lord Chief Baron, of which the *King v. Rowan*, and the *King v. Drenan*, are recent instances.

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Case.Gilb. Rep.
308.

discharge on motion, and that discharge too as well by the court out of which the process issued, as by the court that the juror, &c. was attending on, as it was done in the case of *Hatch v. Blissett*, Trin. 13 Anne. Mrs. *Blissett* the defendant having been arrested in her return to *Portsmouth* from *Winchester*, where she had been attending a cause of her own, the Court of King's Bench, out of which the process issued, discharged her on motion the next term, and judicially took notice of the privilege belonging to the Court of *Nisi Prius*.

Defendant discharged (b).

(b) The doctrine concerning the privilege of parliament, as well from arrests as suits, appears to have undergone much discussion, without attaining, for a long time, that certainty which is the great object of juridical disquisition. The opinions of writers upon this subject are as various as they are numerous; Lord *Coke*, who undoubtedly was an able parliamentary lawyer, is not always consistent with himself, and the contradictory decisions of the two houses of parliament, either lead us to infer, that they had not themselves very precise ideas of the nature of their own rights, or to suspect that their determinations were not always influenced by the purest motives.—In one instance, we find the House of Commons procuring their member to be discharged, as a right to which he was entitled, and which they would not suffer to be disputed:—in another, the Commons are embarrassed with doubts, and beg the advice of the Lords, by whom they are referred to the Judges, who, with profound humility and respect, say, “That they ought not to answer to that question, for it hath not been used aforetime, that the Justices should in any wise determine the privilege of this high Court of Parliament.”—*Vid. 1 Hatsell's Prec.* 29. the case of Mr. *Thorp*, who, though Speaker of the House, was suffered to remain in custody. But in a few years after, we find them so offended at the arrest of a member, that they sent for the Warden of the Fleet, and committed him to the Tower, for refusing to discharge

charge his prisoner; after which, the Recorder of London very gravely proposed, that six members, accompanied by the serjeant and mace, should go to the Fleet, demand the release of their member;—if refused, they should break open the doors, and take him away by force.—This extraordinary proposition was actually carried by a majority, and the members appointed were proceeding to execute their commission, until the Speaker informed them, they might be subject to actions, upon which they relinquished this violent measure. *Vide* Sir Thomas Shirley's case, 5 vol. *Parl. Hist.* 113. It would be improper in a note of this kind (and indeed unnecessary, considering the alterations which have been made by statutes) to enumerate the variety of precedents that occur in the Journals and other collections. The most material are arranged in Mr. *Hatfield's Cases of Privilege*:—but I hope it will not be considered amiss to state briefly what appears to have been the progress of the doctrine.—The privilege of exemption from arrests flowed originally from the principle, that it was necessary to secure the attendance of every member in the discharge of his parliamentary duty, which being paramount to his obedience to the ordinary legal process at the suit of a private person, it naturally followed that such his attendance should neither be prevented by the dread of confinement, nor interrupted by any restraint of personal liberty.—When therefore a member was arrested upon *mesne* process, he sued out a writ of privilege, which upon being pleaded, operated as a *superseas*, 4 *Reg.* 834. *Ryley's Placita Parliam. Append.* 551. But upon an arrest in *execution*, there seems to have been considerable difficulty, inasmuch as the officer, by discharging the member, became liable to an action for an escape, and the plaintiff could not issue a new writ for the recovery of his demand. To remedy these inconveniencies, they had recourse, in every particular case, to a special act of parliament, which indemnified the officer, and enabled the party to sue out a new writ, after the rising of parliament, *Hyde's Case.* 1 *Hatf. Prec.* 44. However, *Elfyng* and *Dodderidge* are of opinion, that these acts were unnecessary, that the arrest was merely void, and the execution was suspended during the continuance of parliament, *Elfyng's Parl.* 199. *Dodderidge's Antiq.* in the preface. These are no doubt respectable authorities, but they must be outweighed by those several acts of parliament, which are so many legislative declarations of a contrary opinion. Thus far the privilege

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privilege was ascertained in the reign of Ed. 4. with respect to arrests. Attempts however were made to extend it to *suits*; for in *Ryves v. Coffin*, Hil. 12 Ed. 4. the defendant pleaded a writ setting forth a custom, that the lords, knights, citizens, &c. *ad parlamenta venientes, Et in eisdem momentis arrestari minime debeant, imprisonari, "SEU IMPLACITARI,"* &c. The plaintiff in his replication demands judgment of the writ, alleging there was no such custom. The Barons of the *Exchequer*, after consulting the Judges of the other Courts, declare their opinion, that no such custom existed to prevent their being impleaded, and they disallowed the writ, *Prynne's 4 Reg. 762*. This opinion of all the Judges, explicitly pronounced, very little more than twenty years after *Thorpe's* case, shews that a great change had taken place in their sentiments since that time, when the privilege of parliament was thought to be so mysterious, that the Justices should not in *any* wise determine it; or else evinces that the Judges had in *Thorpe's* case affected a reserve, which policy might have recommended, and the circumstances of the times have rendered prudent.——In about three years after the case of *Ryves v. Coffin* was determined, the case of *Mr. Atwyl* occurred, when the legislature passed an act to stop proceedings against him upon informations in the *Exchequer*, the preamble of which act recites, that not only his person ought to be free, but also his *houses, and other goods and chattels necessary to be had with him*, 1 *Hatf. Pres. 48*.——In the *Earl of Huntingdon's*, Aug. 1554, the Lords declare the service of a *subpoena* in parliament time, to be a breach of privilege, in which the Commons refused to concur;—but in 1557, when a member of their own body complained of being served with a *subpoena* to appear in Chancery, they sent a message to the Chancellor to revoke the process; and in 1601, they proceeded so far as to resolve, that serving *subpoenas ad testificandum*, without leave, was a breach of privilege.——About this time too, the practice of pleading the writ of privilege in cases of arrest, (except when parliament was not sitting) and of passing special acts appears to have fallen into disuse, and the two houses exercised that power, which must have been incident to their constitution, and necessary to preserve their authority, namely, that of discharging their member upon their own order, executed by their own officer:—in many instances they punished the persons who sued out, as well as those who executed the process. But to remedy

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medy those mischiefs, for which special acts had been thought necessary, the stat. 1 Jac. 1. c. 13. was passed, enacting, "That if
" one in execution be set at liberty by privilege of parliament, after
" such privilege determined, the party may take a new execution;
" and no sheriff or bailiff shall be charged for delivering such pri-
" viledged person out of execution."—But in subsequent times, the
extent to which the privileges had been pushed, began to be severely
felt, when parliaments became frequent, and the sessions of long
duration;—it was extremely difficult to prosecute a suit against a
member; and upon a writ of error, or appeal to parliament in which
a member was concerned, I conceive it must have been impossible
to proceed, for the very assembling of the court was a suspension of
its jurisdiction *quoad* a member of parliament. But the claims of
justice have at length been yielded to, and several statutes have been
passed for the relief of suitors, without infringing upon the necessary
privileges of the respective houses. By 12 & 13 W. 3. c. 3. actions
and suits may be commenced against a peer or member of parlia-
ment after the dissolution, and in the interval of parliament.——
11 G. 2. c. 24. extended the benefit to some of the courts of session
in *Wales*; and by 10 G. 3. c. 50. "No action, suit, or any other
" process, or proceeding thereupon, shall at any time be impeached,
" stayed or delayed by or under colour or pretence of any privilege
" of parliament."—The persons of the members are protected, and
the proceeding is by distress infinite.

After these several acts of parliament, and the numerous deci-
sions upon the subject of privilege in general, it must appear extra-
ordinary that the duration of the privilege from *arrest* should remain
unascertained to this day. *Prynne* says, it continued so long as the
member received wages, which were paid after the dissolution for a
number of days proportionate to the distance of the member's place
of abode, from that where the parliament was held.—Judge *Black-*
stone says, the privilege continues forty days after every prorogation,
and forty days before the next appointed meeting, for which he cites
the case in 2 *Lev.* 72. *vid.* 1 *Bl. Com.* 165. But the case in *Lev.*
cannot be considered as having decided that point, otherwise the
Judges would not have hesitated as they did in Colonel *Pitt's* Case,
in which they said, it was not necessary to determine the time, that
it must in all events be a *convenient* time, and that two days was not
a convenient

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a convenient time. — However, the observation I have made applies only to *England*, for in *Ireland* the law of privilege was settled so early as the year 1463. — By 3 *Ed.* 4. c. 1. “No minister of the parliament, coming or going to the said parliament, during forty days before and forty days after the said parliament be finished, should be *empeaded*, vexed, or troubled by no mean.” — I have only to add to this note, which I feel I have extended to an unreasonable length, the several other *Irish* statutes upon the same subject. — 28 *Hen.* 6. c. 4. imposed a penalty upon persons suing out writs of privilege, when they were not members. — 10 & 11 *Car.* 1. c. 12. indemnifies the sheriff, and gives a new writ of execution, &c. — 6 *Ann.* c. 8. explains what is meant in the stat. of *Edw.* 4. by the words “*after the said parliament finished*,” — that the privilege begins forty days before the meeting, and continues forty days after every prorogation or dissolution. — 1 *Geo.* 2. c. 8. persons entitled to privilege may be sued after fourteen days following the dissolution, until fourteen days of the next meeting. — 11 & 12 *Geo.* 3. c. 12. continued by 23 & 24 *Geo.* 3. c. 36. and further continued by 30 *Geo.* 3. c. 45. f. 17. to 24th June, 1796, and to the end of the next session, gives the full benefit of suing at any time, but the persons of members are not to be arrested.

Michaelmas

Michaelmas Term,

10th Geo. II. 1736.

MIDDLETON *against* CROFTS, in Prohibition.

LORD HARDWICKE, *Chief Justice*, delivered the opinion of the court. This is a declaration in prohibition, in which the plaintiffs, husband and wife, set forth the 7 & 8 W. 3. c. 35. whereby the penalty of 100l. is inflicted upon any person who shall marry any couple without license or banns regularly published, and 10l. penalty upon the man so married, to be recovered with costs of suit by the informer; and further set forth, that although

The jurisdiction of the ecclesiastical court with respect to clandestine marriages. Ca. Temp. Hardw. 57, 326, 395. 2 Kely 148. 2 Atk. 650. 2 Barnard. 351. 2 Stra. 1056. Cunn. 55, pl. 14 S. C.

114. Andr. 57. 4 Vin. Abr. 330.

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the lay people of the land are not punishable by any canons, or constitutions ecclesiastical, yet the vicar general, or provincial of the bishop of *Hereford*, intending to vex and oppress the plaintiffs, and to draw the trial, which of right belonged to the king's courts, into his own, had libelled them in the court christian of the said bishop, at the promotion of the defendants, and had summoned them to answer, &c. and set forth in the charge against them in a libel to this effect; That by the laws, canons, and constitutions of the church, it was required, that every person to be married, ought to have their banns regularly published, or to procure a faculty or license from the ordinary; and ought also to be married between the hours of eight and twelve in the forenoon, in some church or chapel; and that whoever offended in any of these particulars, was liable to ecclesiastical censure, and that in 1731, and before the commencement of the suit, the plaintiffs being inhabitants of *Dove*, in *Staffordshire*, procured themselves to be clandestinely married, by one *Allen*, a clergyman, in their own dwelling-house, between the hours of one and eight in the afternoon, without banns or license first obtained; and that by virtue of such marriage, they have since cohabited together as man and wife: then the declaration alleges, that the court christian has no cognizance of this matter, for that it is a mere temporal offence; and further, that the plaintiffs delivered to the defendant the king's writ of prohibition, notwithstanding which, he still continues his suit. To this declaration, the defendant by his plea, denies that he has proceeded in the ecclesiastical court against the king's prohibition, and for

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for confutation demurs generally, and plaintiffs join in demurrer.

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Three questions have been made at the bar,

First, Whether by virtue of the canons of 1603, lay persons are punishable for this offence in the spiritual court by ecclesiastical censures?

Secondly, Whether if it be admitted that lay persons are not bound by these canons, yet whether the spiritual court has not a power to punish under a jurisdiction which they before enjoyed by virtue of the ancient canon law, received and allowed by the general usage and custom of the realm?

Thirdly, Whether supposing the spiritual court ever had such jurisdiction, yet whether it be not taken away by the 8 W. 3. cap. 35. which inflicts a penalty on the man so married?

The first of these questions regularly divides itself into two considerations :

First, Whether the canons of 1603, relating to clandestine marriages, do, by their express words and provisions, extend to the persons in the present case? And the second will be, Whether, supposing that lay persons are within the express words of these canons, their authorities can bind the laity?

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As to the first consideration, there are five canons relating to clandestine marriages in those of 1603, the 62d. 101st. 102d. 103d. 104th. The 62d. ordains that no minister shall celebrate matrimony between any persons without banns or license, nor in any place but a church or chapel, under a penalty of three years suspension; the 101st. 102d. and 103d. relate only to the person by whom, and the manner in which, license is to be granted; the 104th. relates to persons marrying under colour of licenses which are void, not being obtained according to the directions of the above canons; and declares that any officer offending shall be suspended six months, and that the parties married by such false license, shall be subject to the penalties of clandestine marriage, and that the license shall be void.—It seems plain from these canons, that none of them could any way affect the parties contracting, except the last clause 104th. of marrying by false license; but this is a marriage without banns, or any license at all.

Then as to the second point, supposing the laity within the words of these canons, then whether the authority by which they are made can be sufficient to bind the laity? The authority by which they are made is well known to be the bishops and clergy, in convocation assembled, by royal license, and afterwards confirmed by the king; but the objection to them is, that they never were confirmed by parliament, and therefore cannot bind the laity. This is a question of a very extensive nature, and of great consequence, and some variety appears in our law books about it; notwithstanding

ing which, I always understood, until it was disputed in the present case, that these canons did not bind the laity for want of a parliamentary sanction.

Upon this reason, I suppose it was objected at the bar, that these canons of 1603 were of no validity with regard to the laity, and my brother WRIGHT, who in the last argument was of counsel for the defendants in prohibition, expressly admitted that the canons of 1603 did not *proprio vigore*, bind the laity; but insisted upon the second point, That the ancient canons alone, established under such sanction, would bind the laity; but as the contrary doctrine was strenuously contended for by some of the counsel of that side, it is necessary for us to give our opinion upon this matter, upon the best consideration: and we are all of opinion, that the canons of 1603, by their not being confirmed in parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, for in some respects they do; there being many provisions in these canons that are of ancient allowance, and declaratory of the ancient usage of the church of this realm, which bind by an authority precedent to these latter canons.

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1 Black.
Com. 79.

The canons
of 1603 do
not bind the
laity, not
being con-
firmed by
parliament,
ante 76.

In treating of this question, it may serve for illustration and ornament, to look back into the ancient constitution of this realm, and the several councils held in this kingdom, under the Saxon and Norman governments; and any one who gives himself the trouble to look into the laborious collections of that learned antiquary, Sir H. Spelman, will find that he gives but little insight towards fixing this point of the canon law. The like may

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1 Black.
Com. 82.

be said of the councils before the conquest, by reason they were mixt assemblies, composed partly of the laity, and part ecclesiastics, where sometimes the king with the nobility and commons were present; but how the commons came to these councils, whether by election or otherwise, or whether they had any part or share in making of canons, or what their constitution was, is extremely dark and uncertain: it is the same with regard to many of the constitutions, after the coming of the Normans; then follow the legantine constitutions, substituted merely by papal usurpations and authority. Upon this important question therefore, it is safest for judges to proceed upon sure and certain foundations, such as the fundamental principles of our constitution, acts of parliament, and the solemn judicial opinions and resolutions contained in our old law books relating to this matter.

No law can bind the people unless made by king, lords, and commons.

To argue first from the fundamentals, the general nature and foundation of our constitution, it is now certain, that no law can be made to bind the people of the land, unless their own consent be first obtained by the joint concurrence of the three estates, king, lords, and commons; for neither the king alone, nor with the concurrence of any particular number, or order of men, has this authority; this part of the constitution is so well known, that to cite authority for it, would be only to prove that it is now day. I shall therefore only refer to the parliament rolls of 2 H. 5. *Parl. 2.* No. 10. and to 12 Co. 74. and 4 *Inst.* 1. where it is determined, that the king cannot change the law of the land by his proclamation. The authority of making laws arises

arises to the king as our sovereign lord, and to the lords by inherent right, as they are one estate of the realm, who are to be bound by the laws; and to the commons, as representatives of the people; and therefore my Lord Coke says, that they represent the whole commons of this realm, and are trusted by them; so that in every act of parliament by consent of king, lords, and commons, the consent of every individual subject is by representation contained, and by reason of such representation, every man is said to be a party, and privy to the act. But of canons made in convocation, all these are wanting, except the royal assent under the broad seal.

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It has been said by Doctor *Andrews*, for the defendant, that the House of Commons are but an implied, and not an actual representation of the body of the commonalty, because there are many of the people who have no right to vote in the choice of a representative; and yet in the convocation, where the canons are made, the whole nation is as much or more represented, because, says he, every parson represents his parish, and every parson has a vote for chusing proctors for convocation; but in electing the commons, men having no freehold or freehold in ancient demesne, women, and persons within age, have no right of voting for members of parliament: the fact is certainly true, that many people, as women, copyholders, and freeholders in ancient demesne, have no right of voting in the choice of members of parliament; but that does not make it less a representation of the whole; for, in a popular state, it is not to be imagined, nor

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was it ever supposed, that every individual must necessarily have a right of voting, but that some rule of qualification must be laid down, and that has been taken from the most valuable, on account of property, and that likewise has been ascertained by latter acts of parliament; but this is a new and groundless notion, unheard of in our law books, that the rector of every parish is the representative of his whole parish in the election of a convocation man: he who is possessed of a certain share of property, is represented in parliament; but there is no manner of foundation, nor the least colour in the world to say, that a parson represents his parish; for he is scarce ever chosen or put in by them, but by the ordinary, or lay patron; and how can they delegate any such power to the parson, as to vote for a representative of his whole parish? Certainly there is no room to say they can; it is contradictory to the very writ, constantly issued to every metropolitan to summon a convocation; it is contrary likewise to the præmonitory clause in every summons to the bishop; and it is also contrary to the writ issued by the bishop to his diocese, which directs which of the clergy shall come in their proper persons, and which by representation, 4 *Inst.*
 4. *Præmonentes decanum capitulum ecclesiæ vestræ ac archidiaconos, totumque clerum vestræ dioecesi quod iidem decani et archidiaconi in propriis personis suis ac dictum capitulum per unum, idemque clerus per duos procuratores idoneos plenam et sufficientiam potestatem ab ipsis capitulo & clero divisim habentes prædictæ die & loco personaliter interfint, &c.* The words and common sense of the writ import, that only the clergy are called, and the proctors are the representatives of the clergy alone,

alone, and derive their power from them. It is said, 4 *Inst.* 322. that in convocation the whole body of the clergy are present in person, or by representation; from hence arises the substantial difference between the ancient canons made in the general council of the church, and confirmed by the Roman emperors after they became christians, and our more modern canons, made either in a national or provincial synod, and confirmed by the crown: for there is no doubt, but that the ancient canons of the church made and confirmed by the Roman emperors, bound all the subjects of the empire, laity as well as clergy, as far as all the obligations of them extended; but the binding force of these canons was not from any particular prerogative in the prince, as head of the church, but because the supreme legislative power was vested in him by the *Lex Regia* mentioned by *Justinian*, and in the *Digest de constitutionibus*, L. 1. Tit. 4. *Et quod principi placuit, legis habet vigorem*. By this law, we see the whole power of making laws was entirely given into the hands of the prince; but probably it might be gained at first by usurpation: but the case is far otherwise with us in *England*, where the king has only a part of the legislative power; and therefore the argument in *Salk.* that the king's consent cannot make a canon binding, because he has not the legislative power in him, as the Roman emperors had, is of great weight in this question, and has received no answer.

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Inst. lib. 1.
tit. 2. f. 16.

Salk. 673.

The answers endeavoured to be given are two, first, that the confirmation of the emperor was only to give them a civil sanction; but although this was

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was said, it was not proved; for I do not find any temporal penakies annexed to the breach of any of them. The second answer was, that wherever the law had fixed a power to bind the people; that must include the consent of the people; and therefore as the law of *England* has lodged this power in the crown of making ecclesiastical laws, the laity are bound to obey them, when so made: but this is begging the main question, which is, Whether the law has deposited in the crown the sole power of binding the laity, by canons made without the consent of parliament.

Another argument drawn from the reason of the *English* constitution is, that the power of binding by new laws, and that of imposing taxes, are co-extensive:—thus the parliament makes laws and imposes taxes; but the clergy in convocation never pretended to any such power as to charge a grant of a tenth or fifteenth to bind any one but themselves; and by analogy of reason they can only bind themselves by their constitutions. If they could do otherwise, it would greatly affect both the liberty and the property of the laity, excommunication being the immediate consequence of disobedience to their laws, the effect of which is, to disable a person from doing any judicial act; as to sue any action at law, be a witness, &c. which greatly affects their property; and the writ *De excommunicato capiendo* intirely deprives them of their liberty, by imprisonment without bail or mainprize. The convocation may make laws to bind themselves, but it is admitted they cannot bind the property of the laity.

Again,

Again, the rule of any constitution in a particular case, cannot be better found out than by observing what the constant usage and practice has been; now the practice ever since the reformation has been, that when any material ordinance or regulation has been made to bind the laity, as well as the clergy, in matters merely ecclesiastical, they have been either enacted or confirmed by parliament; of this the several acts of uniformity are so many instances, for by them the very rites and ceremonies of the church are forbid or established; and it is also very plain from the preamble of these acts, that although they were first approved and took their original from convocation, yet that the convocation was looked upon only as an assembly of grave and learned men, fit and proper to propose laws, but never as having authority to enact them.

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To this it has been objected, that the reason of the parliaments' sanction was to enforce them by civil penalties, and undoubtedly this was one, but not the only reason; since if it had been the prevailing opinion of those times, that the clergy could make canons to bind the laity, it cannot but seem very strange that they could not trust the least regulation of ever so small importance, to the authority of a canon and ecclesiastical censure, a sanction fully sufficient to enforce it.

Upon one of the arguments in this case, it was, though not in words asserted, yet endeavoured to be proved, that as the spiritual court has power over the laity in matters of marriage, so the convocation

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In what case
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vocation had to make canons to bind them in those matters; and that in the *Re Ecclesiastica*, where spiritual courts have confessedly a jurisdiction, there the convocation have a power to make new laws for the better regulation of such matters. The spiritual courts have undoubtedly a jurisdiction over marriage, testamentary bequest, tythes, &c. : if this argument were to be allowed, they might as well make canons to establish the degrees of consanguinity within which marriage may be contracted, and order the descent of inheritance of lands, and take recognizance of several species of crimes, and then they would in a very extensive manner affect both the property and persons of the laity by their *significavit*; and what consequence this would have is plain to every eye. This attempt would tend to make the power of convocation in making canons, co-extensive with the jurisdiction and authority of parliament. But no alteration as yet has been ever made in these affairs without the interposition and authority of parliament, which is sufficiently witnessed by 32 *Hen.* 8. c. 38. concerning the lawful degrees of marriage, 21 *Hen.* 8. c. 5. concerning the probate of wills, 22 & 23 *Car.* 2. c. 10. concerning intestates estates; if this doctrine had been law at the time of making the statute of *Merton*, the bishops would have had no reason to have applied to parliament to alter it, nor would they have received that famous and memorable answer from the Lords, *Nolumus leges Angliæ mutari*. The only authority (for the contrary opinion) that has been produced, is in 1 *Ro. Abr. Needham's case*, *Hil.* 7 *Y.* 1. C. B. the authority of which amounts to but little, for forty shillings for several dioceses make
bona

2 Ro. Abr.
586. pl. 3.
1 Ro. Abr.
909. L. 1.
pl. 50.

Bona notabilia.

bona notabilia, as appears in *Perkins* 489.; so that it appears this canon has changed the law, if it were otherwise before; *Rolle* himself seems to express a doubt of this case in the very case itself; besides, if it be allowed as good authority, it affects only the clergy, the case being only between the officers of the archbishop and bishop, concerning their jurisdiction, and there are no words in it that will affect the laity: what further weakens the authority of this case is, that in Sir *John Needham's* case in *Coke's Reports*, which I take to be the same case, nothing is mentioned to this effect; and this is a point of too great moment to be determined by a loose note in an Abridgment.

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8 Co. 135.

I come now to the second head of argument, the statute law, and as I find no positive declaration made by parliament as to this point, so all that can be expected from hence is to learn the sense of the legislature in these matters; and the several acts of uniformity (as before noted) furnish proofs very material to shew, that the parliament have ever been of that opinion; at least, that they themselves alone have power to make canons to bind the whole people. 25 *Hen.* 8. c. 19. is the only express act of parliament concerning the making of canons, where a commission is appointed of sixteen clergy and sixteen laymen to review the canons then in force, and to continue or abrogate which of them they thought fit. This statute was continued by 27 *Hen.* 8. c. 15. and by 35 *Hen.* 8. c. 16. and by 3 & 4. *Edw.* 6. c. 11.; but these being only acts for continuance, are not published in latter editions of the statutes, but are to be found in *Rastall's*

1736. *tail's* statutes at large; but 25 Hen. 8. is silent as to the persons over whom the obligations of the canons shall extend. There is indeed an humble acknowledgment of the clergy, according to the truth; for the preamble recites the request of the clergy, and their submission and promise, never to enact or execute any new canon, unless the king's royal license or assent may be first obtained for that purpose, as also their request to have the canons revised.

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Two objections arise from these statutes material to the present question:

First, That both the king and clergy thought it necessary to take with them the authority of parliament for abrogating part, and establishing part of the ancient canons; and surely if that opinion had then obtained, that it was the right of the king and clergy in convocation (exclusive of the parliament) to have made canons to bind the whole kingdom, it is scarce to be thought that they would have resorted to the sanction of parliament, in the reign of a prince so jealous of his prerogative, since it is obvious to every one that he carried it upon every occasion as far as ever any prince did in this kingdom.

When an act is done under a power, it is esteemed to have its validity from that power.

Secondly, If the design of revising and reforming the ancient canons had been effectually carried into execution, the improved system would have derived its binding force, from the power and authority of parliament; for nothing is more certain in

in the law than this, that when any act is done under a power, that act is esteemed to have its validity from that power.

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I proceed now to the last consideration upon which our opinion is founded, viz. The Resolutions and Judicial Opinions, in our books: and the first case in order of time, is the case of the prior of *Leeds*, 20 H. 6. c. 13. abridged by *Brooke*, Title *Ordinary*, 1. The case was, that the clergy in convocation had granted a tenth to the king, and had enacted that none should be exempted by virtue of any privilege. The prior of *Leeds* claimed an exemption by the king's letters patent, and the case was heard before all the judges; but it does not appear to have been determined: but the argument turns upon that point, whether the proviso in the act of convocation, to which the prior is to be considered a party, did not amount to a waiver of his privilege; and whether he should not have insisted on his exemption in convocation. Upon this occasion, Justice *Newton* said that the convocation had a power only in matters merely spiritual; and that the ordinary has a power to make fasting days and holydays, but not to allow or disallow the king's patents; and to make the constitutions provincial to bind the clergy, but not to bind the temporality; and this opinion is not there denied by any body. The next case is, *Mich. 24 Edw. 4. c. 44.* The abbot of *Waltham*, who claimed the exemption, as in the foregoing case, but no judgment was given on the principal point, but it went off on a point of pleading: in the argument of this case, much is said concerning the power of the convocation; and it

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Every person
as party and
privy, bound
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it was insisted upon, on the part of the clergy, that the abbot was estopped, for that the convocation is of equal strength among the clergy, with the parliament among the laity or temporality; and by acts of parliament every person shall be bound as party and privy. That the reason is the same as to acts of convocation; for every abbot and prior is party and privy, and therefore ought to be estopped by acts in convocation: it is said likewise, that they may bind themselves by an act of convocation, but nothing further is advanced on the part of the defendant.

To the first of these cases, it was said by Doctor *Andrews* that *Brooke* has misrepresented this matter, by making *Newton* say, that the convocation could not do any thing to bind the temporality, which means temporal persons; but that in the *Tear Books* it was *le temporalitie*, which means temporal things; so that what is there said by *Newton*, relates only to temporal rights, and not to temporal persons; but in framing this opinion, only the last edition of the *Tear Books* has been consulted, for in the old edition it is *le temporalitie*, and therefore this criticism being founded on a false print, falls to the ground.

It was further said, that in the case of the prior of *Leeds*, the question was not whether the convocation could bind temporal persons, but temporal matters; for undoubtedly the prior was a spiritual person, and the question only was, whether they could conclude him from claiming his exemption, which was a temporal right: but it is plain *Newton* gives

gives his opinion at large as to the power of the convocation, and considers the king as affected by their claiming to allow, or disallow his patent; and the words *Ceux de sainte eglise*, which are opposed to *la temporalitie*, must mean the *persons* of the clergy; so *Brooke* construes them, for he has put the word clergy in their stead, and consequently *le temporalitie* means temporal persons: the like observation has been made on the abbot of *Waltham's* case, that it relates only to the temporal rights of the abbot; but this is no answer to what is there laid down, for it is clear that it is to be taken for granted throughout the case, that the convocation can only bind the clergy; and this was all that was endeavoured by the counsel who were for extending the power of convocation; for it is put upon this point, that all the clergy being represented in convocation, therefore they bind themselves: but I think the clergy in convocation have a power only to bind themselves in spiritual matters, and cannot bind themselves in temporal matters.

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Convocation
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themselves
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The next case is called the *Convocation* case, 12 Co. 72. where the same is laid down, that the convocation may bind themselves, founded upon the foregoing cases: there is indeed an extraordinary exception in the end of the case, for it is there said, they can do nothing against the law of the land; then comes the exception, *viz.* except for spiritual causes, or which concern spiritual persons; but this is certainly misprinted, for it is neither grammar nor sense. In *Cowdry's* case, 5 Co. 32. reported also in *Moore* 755. and in 2 Cro. 37. it is held, that the king may, with the consent of the convocation, make

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make laws to bind the clergy, without the parliament: in the case *Egt 11 W. 3. Carth. 485*, it was laid down by Holt, Chief Justice, that all the clergy were bound by canons confirmed by the king; but that the laity are not, unless they are confirmed by parliament. This case is reported likewise in *Salk. 134.* and to the same effect, though not so fully as to this point; but as this is a case of very great consequence, I have consulted two MS. notes of it, taken by the ablest hands, one by Lord RAYMOND, Chief Justice, and the other by Lord Chief Justice EYRE, and both of them confirm *Carth. Report*. There was another case much to the same purpose, *Trin. 3 Anne*, reported in *Mod. Cases, 188. (d)*, which though it is not a book of the greatest authority, or most correctness, deserves to be credited in this particular, because it is agreeable to Lord Chief Justice HOLT's opinion, in another report of the case; the last is *Davis's case, Mich. 5 Geo. 1. C. B.* where a prohibition was refused upon *12 Anne § 7.* being a prosecution in the spiritual court for teaching school without license. These are all the cases on this side of the question, from whence the prevailing opinion appears to have been, that the canons did not bind the laity without the strength of an act of parliament, because they were not represented in convocation.

The cases produced on the other side were but three; the first of these is in *Maore 781. (e)* in Chancery,

(d) 6 Mod. 188. *Britton v. Standish.* 1 Salk. 166. 3 Salk. 88. Holt. 141.

(e) *Bird v. Smith.*

Chancery, where it is said, and resolved, That the canons of the church, made by the convocation and the king without the parliament, shall bind in all matters ecclesiastical as well as an act of parliament; for they say, that by the common law every archbishop in his province, bishop in his diocese, and the house of convocation in the nation, may make canons to bind within the several limits; this is certainly a very extraordinary case, and the decree such as would not be allowed at this day; so that there is great room to suspect the reasoning of it: whatever is there said of the power of archbishop and bishops is certainly not law; but at most the case was between clergymen, and *in re ecclesiastica*; and what is said in it may be understood to be said of clergymen only; for it is certainly true no bishop can make canons to bind his diocese, and all that was necessary to be determined in the case was, that they can bind the clergy, so that the case is not much to be relied on in the present question.

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The next case was in *Vaugh.* 327. where it is said, that a lawful canon is the law of this kingdom, as well as an act of parliament, and that whatever is the law of the kingdom, is as much the law as any thing else that is so; for what is law does not *suscipere majus aut minus*. This is true indeed, but what does it prove? Nothing in the present case, because it determines not what is necessary to make a lawful canon; and therefore the expressions in this case are nothing at all to the purpose.

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The last case was that of *Grove and Elliot, 2 Vent.* 41. where Chief Justice VAUGHAN says, that the canons of 1603 are enforced, although never confirmed by parliament; and that the convocation, with the king's consent, may make canons for regulating the church that shall bind laics, as well ecclesiastics; it does not appear from hence, that Chief Justice VAUGHAN was of a different opinion from that which is now delivered; but the authority is much weakened, for it appears to be only on motion; and TYRRELL, one of the judges then on the bench was of a contrary opinion, and the other two judges did not deliver their opinion in this matter, and therefore it was only the opinion of a single judge against another judge, and all this upon a point not at all material in the case before them.

Upon stating these authorities, it is easy to decide which will preponderate; as to that case of *Bird v. Smith*, no stress can be laid on it, and then there remains only the opinion of VAUGHAN, to whom I oppose NEWTON, PIGGOT, COKE, TYRREL, HOLT, and the opinion of all the judges in the star chamber.

As to the second general question, since we are clear of the opinion that the canons of 1603 did not bind the laity, the next question will be, Whether the spiritual courts have not a power to punish by the ancient canon law, received and allowed before that time, by the general usage and custom of the realm?—And we are all of opinion that they have such a jurisdiction. That many such usages have

have obtained in this realm I have already shewn by what I have mentioned of *Caudrie's* case, and this we think is really warranted by 25 Hen. 8. where there are words of such import 35 Hen. 8. c. 16: and upon this rests the only and true foundation of all ecclesiastical jurisdiction within this realm:

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I have seen a manuscript of Lord Chief Justice HALE's, where he imagines christianity was first introduced into the land by coercion, though its first institution was not by such means; says he, I conceive when christianity was first introduced into this land, it came not without some external discipline; but that could not bind any person without the consent of the supreme power, or the voluntary submission of the people who received it. If it was submitted to by the supreme power, then it was the supreme civil power that gave it force: if the other, it was by a voluntary pact, which gave it power no longer than the parties submitting pleased, and the king connived at it, and this might by degrees produce a custom whereby it grew equal to other customs.

The next thing to be considered is, Whether this canon of clandestine marriages be one of those so received by custom as to be of force in England. The canon of the council of Lateran made the 3 Edw. 3. Linwood, Lib. 4. Tit. 3. *De clandestinis dispensatione*, which contains a general prohibition against such marriages, inflicts the years suspension on a minister marrying, and in *contrahentes pena debita percellendo*, which says Linwood in his Commentary,

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mentary, was that the contracting parties were liable to be excommunicated *ipso facto*.

It has been urged by Dr. *Andrews* that this jurisdiction has been received and allowed in *England*, as appears by several entries in the Registry of the see of *Canterbury*, which shews that this canon has been several times carried into execution: but this might be *sub silentio*, and we can hardly allow it as an authority, for the parties might rather choose to submit to the sentence, than to undergo the hazard and charge of contesting it; but then there is a regular judgment in the case of *Matingley* and *Martin*, in Sir *William Jones*, 257. which confirms it, for this is a case in point, and I can find no resolution to the contrary, and it is the rather to be supposed, because the clandestine marriages have always been complained of as detrimental to families; otherwise lay persons must have been unpunishable 'till 7 & 8 W. 3. c. 35. so that we think this one of the ancient received canons.

This gives rise to the third general question, Whether this jurisdiction be either expressly, or by necessary implication taken away by 7 & 8 W. 3.? But before we determine this question, I shall make two observations: first, that although some doubt was made whether this penal clause be still in force, yet by looking into the statutes, I find it is still in force, being expressly taken notice of in several subsequent acts, and thereby continued as 10 Queen Anne c. 19. sect. 176. The second observation is, that this penalty is inflicted only on the husband, so that if the jurisdiction is taken away by this act,
 it

it is only so as to him ;—but upon mature deliberation, we are all of opinion, that this statute has not warranted the taking away the spiritual jurisdiction.

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The general question here therefore is this, Whether an act of parliament giving a penalty for a matter under ecclesiastical jurisdiction, takes away such jurisdiction, if there be no saving in it? The following cases were cited to shew that it was not taken away; in *Grove* and *Elliot*, 2 *Ventr.* 41. the court of C. B. held that the spiritual court might proceed, notwithstanding the statute 22 & 23 *Cdr.* 2. c. 10. So in the case of *Cory* and *Peppar*, 2 *Lev.* 222. Sir *T. Jones*, 93. but the case has not been taken notice of I think at the bar: but *Carth.* 464. is later, and directly opposite to those. The case of *Burdett* and *Matthews*, 12 *Anne* was subsequent to all these, but never was determined by reason of the death of one of the parties. In *Carth.* 464. the penalty by statute, and the punishment by the spiritual courts were both for the same purpose and intent, being to prevent the teaching school without license; and it must be admitted that where the spiritual court gives sentence for the same end and purpose as the temporal courts, it will be bad by the common rules of law, that *nemo bis puniri debet pro uno et eodem delicto*, which is a good objection against allowing them to proceed in such cases, for how can a conviction in their courts be pleaded in a suit at common law for the same thing? But the case in judgment differs much from that, and we hold it to be a sort of middle case; for here the penalty of 10l. is not inflicted with the same intent as

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the punishment by ecclesiastical censures, but collaterally to secure the duties upon marriages, which is part of the king's revenue.

This plainly appears to be the intent from the preamble to the statute, and the statute itself; so here the proceedings in the two courts are *diverso intuitu, ubi eadem causa diversis rationibus ventilatur*, as are the words of the statute *De Art. Cler. 9. Edw. 2. c. 6.*; the prosecution in the spiritual court being to prevent and punish the crime, as contrary to the laws of the holy church, and a thing of very bad consequence in itself; the penalty upon the statute is upon another consideration, as it infers a fraud in the party upon the public revenue. So 18 *Eliz.* in the case of bastardy, which is stronger against the ecclesiastical courts than this statute, because there is likewise a power given to punish the parties; but the punishment designed in the statute is not so much on account of the lewdness, as to prevent a charge to the parish by securing it from the expence of maintaining the child, which is the evil arising from lewdness; yet notwithstanding this penalty, the spiritual courts proceed to punish the lewdness.

The common argument for proceeding both in the temporal and spiritual courts for the same offence, has been this, That one punishes only for the injury the public sustains; the other *pro salute anime*: but this is false reasoning, and no more than a distinction in words; for the intent of all punishments is to correct the offender, and to prevent the like crime for the future *in terrorem*, and by

the way of example; so that I hope I have established a more substantial difference why the temporal and ecclesiastical courts should both proceed in this case, than what is generally given for the proceedings of both courts for the same facts;—but there is still another reason for their proceeding in the present case in the spiritual court; the Book of Common Prayer, with the rites and ceremonies therein contained, is established by the acts of uniformity, 1 *Ellz. c. 2. f. 16.* By this the ordinary is impowered and authorized to punish with ecclesiastical censures all such as shall act contrary to, or offend against this statute; from hence it follows, first, That the laity are bound by the Rubric from marrying without publication of banns, as is therein directed; secondly, That they are punishable by the censures of the church for acting contrary to it; and thirdly, by act of uniformity 13 & 14 *Car. 2. c. 4. f. 24.* this power is continued to the church.

And hereupon arises a new question not taken notice of at the bar, *viz.* Whether subsequent acts of parliament substituting new penalties and new methods of proceeding, do not by implication repeal all former acts made for the punishment of the same offences? And whether, supposing this subsequent act might have taken away the authority of the ecclesiastical courts with regard to the power of their canons, yet whether it would extend to a repeal of that power which they enjoyed under a sanction of former acts of parliament? But we think that such subsequent acts do not repeal former acts without negative words; the rule is, that

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Subsequent statutes giving new penalties, do not repeal former ones, without negative words.

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Leges posteriores priores contrarias abrogant: But an act of parliament in the affirmative, giving new penalties, repeals not former acts, without such negative words as shew a manifest design so to do; and in 7 & 8 W. 3. there are no such words, but both acts are consistent, and may be put in execution without interfering with one another; besides, latter acts of parliament have never been taken to be a virtual repeal of former acts, unless there is a contrariety, which is by no means the case in this statute.

I do not find any direction in the Rubric as to the hours of marriage; so as to that part, the prohibition must stand, otherwise the ecclesiastical judge may proceed to censure the parties upon that point alone, in case they should be able to acquit themselves of the rest of the charge, and not of that. The evil of clandestine marriages is one of the growing evils of these times, and productive of many calamities and grievances to the community, and therefore we have thought it our duty not to weaken any power whereby it may be reformed, and seasonably punished.

The rule therefore must be, that the prohibition do stand as to the plaintiffs, not being married between the hours of eight and twelve in the forenoon, and a consultation must be awarded as to all other parts of the charge.

COLMER

COLMER *against* CLARKE.

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WRIT of error on a judgment in C. B. for the plaintiff there, on demurrer to the declaration, which set forth, That in consideration the plaintiff who was a tallyman would take the defendant into his family, and instruct him in the trade with a provision of meat, &c. and an allowance of 20l. wages a year. The defendant promised to serve him for five years, and not to exercise the trade himself for seven years after that time, within the city and liberty of Westminster and bills of mortality; which agreement was by articles under hand and seal; the breach assigned is, the exercise of the trade within, &c. The Court of Common Pleas held the agreement good and agreeable to the rules of law; the restraint from the exercise of trade being confined to a particular district, and founded on a valuable consideration.—Nobody appearing in the King's Bench for the plaintiff in error, the judgment was affirmed. The cases cited for the defendant in error by Mr. Bicknell, were, the case of *Chefman* against *Nainby*, about eight years ago, where this point was solemnly determined in C. B. which judgment was affirmed on a writ of error in the King's Bench, and afterwards in the House of Peers, and the case of *Mitchell v. Reynolds*, in Lord PARKER's time, on the same point.

A bond conditioned to restrain a man from the exercise of his trade for a limited time, within a particular district, and upon valuable consideration, is good.
2 Ld. Raym. 1456.
Show. Rep. 2.

2 Stra. 739.
3 Bro. P. C. 349.

11 Mod. 27,
85, 130.
1 P. Wms. 181.
Fort. 296.

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SMITH *against* BOUCHER, and Others.*Vide ante* 4.

SERJEANT Skinner for the defendants. The replication is clearly ill, for the omission in not filing the affidavit, will not make the process void.

Mr. *Strange* for the plaintiff. The plea is bad in this case, no summons appears before issuing the *capias*; the custom is bad, yet if good it is not pursued. It is, that the party is to make oath he has a personal action, but possibly no cause of action. This custom makes the plaintiff a judge what is a personal action, which is matter of law, and proper for the court, it gives the plaintiff a power of settling the *quantum* the bail is to be taken for, which holds in cases of *contracts* only, not in *trespass*, or where the damage is *uncertain*, for there it is in the discretion of the court, and the *quantum* to be settled by a judge: the apprehension or belief of the plaintiff that the defendant will withdraw himself is not a sufficient foundation to deprive a man of his liberty; a writ of *ne exeat regno* is not obtainable on such a suggestion; by this custom the court is at liberty to proceed either according to the laws of the land, or the customs and statutes of the university, which custom is uncertain and bad; for some certain method of proceeding must be observed, the complaint may be made to one person, the oath administered by another: the complaint may be before the chancellor, his commissary, or his deputy; but the oath before his commissary or deputy,

deputy, who is a different person, and who does not appear to have any authority to administer it.

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against
Bouchier.*

However, the custom is not pursued; the custom is, that the party *believes* he will withdraw, &c. and it is said only here the plaintiff *suspected*, &c. Belief must be founded on some certainty, suspicion on slight circumstances; here there is no oath of 1000l. damages, but only said, so much in his estimation, which is too loose, and not warranted by the custom; the oath is said to be made only *of or upon* the truth of the premises; though the premises be false, yet the party may safely swear *of or upon*, &c.

The *Queen v. Green*, Hil. 2 Anne. Conviction for selling bread, &c. said there oath made *de veritate præmissorum*, held ill. The *Queen v. Gray*, Pasch. 13 Anne. *Præstitit sacramentum de veritate præmissorum materialium infra content.* held ill. The court by the custom is to be held every Friday; but this appears to be held the 7th August 1731, which was upon a Saturday, 2 Salk. 627. This court will take notice of the calendar. *Hoyle* against Lord Cornwallis, *Frim.* 1 Stra. 387, 8 Geo. 1. Error on a judgment in C. B. writ of enquiry laid to be executed the 15th June, which was on a Sunday, which was wrong by the statute of Car. 2. it appearing to be so by looking into the calendar; judgment reversed. By the custom, the court is to be holden within the precincts of the university; this does not appear to have been so holden:—All the defendants having joined in pleading, if the plea be bad as to one, it will be so as to all, though the oath does not appear to the bailiff,

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Ca. temp.
Hardw. 71.
1 Stra. 509.

bailiff, or goaler, yet they are not excusable in this action, unless they had severed in their plea. In *Gwinne v. Poole*, 2 *Lutw.* 935. The reason the point went upon then was, the presumed ignorance of the place, where the cause of action arose; there can be no such pretence here, they cannot be unacquainted with their own customs. In 1 *Ventr.* 220. There can be no justification under the process of an inferior jurisdiction unless it be shewn to be regular (*per cur.* that case is not law.) *Phillips v. Byron Hill*, 8 *Geo.* 1. Trespass against two defendants who justify under a judgment afterwards set aside for irregularity, held no good plea as to the plaintiff, though it would be as to the officer, but he having joined in pleading bad as to both, 1 *Saund.* 28,

Skinner, Serjeant, è *contra*. This is a court founded on immemorial usage, letters patents and acts of parliaments, *Hardr.* 509. 9 *Hen.* 6. 44. *Lit. rep.* 10. having an action personal and cause of action synonymous. The defendant comes before the Chancellor and swears he has an action of damage and injury which he computes at 1000l. which is only more modest than the common method; the plaintiff's apprehension of the defendant's withdrawing himself is within the custom. The Chancellor's election of proceeding by our law, or the custom and statutes of the universities is well warranted by the letters patents confirmed by acts of parliament. The making oath before the Chancellor, his commissary, or deputy, that must be understood deputy of the Chancellor, not of the commissary. This custom thus established is good,
Cra,

Cro. Car. 259. The words, *of and upon the truth of the premisses in the manner aforesaid*, refer to what went before, and the same thing as if repeated. The party by the custom is not obliged to shew the reasons of his belief; suspicion is a degree of belief; objected that no positive oath of 1000l. &c. Though it had been positive, it must have been according to his estimation; I admit the warrant was not on a court day, nor any necessity for it within the custom; objected, not so within the precincts, &c. but it is so according to the custom, which necessarily implies it. Action lies not against a Judge, 2 *Lutw.* 1560, and though against him it does not against his officers, 1 *Lev.* 95.

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Turner v.
Felgate.

1 Sid. 107.

T. Raym. 72.

1 Keb. 453.

478. 488.

822.

Lord HARDWICKE, *Chief Justice*. There are two general points; first as to the custom; the privileges of the university are to be supported as far as the law of the land will permit;—the judgment, here will not affect this custom of the university:—personal action and cause of action are the same thing; the definition of action in the civil law is the right of suing, or *jus prosequendi*. As to the objection, that the party is to swear positively. The party is to swear according to his apprehension, and that is the foundation of the process. It is said it puts it in the power of the plaintiff to settle the *quantum* of the bail. That is still subject to the power of the Judge, and the oath is in the case of the defendant: Objected also, that the custom giving the alternative of proceeding either by the common law or by the custom and statutes of the university;—there is not only a charter for it, but it is confirmed by act of parliament. The charter
singly

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a new court
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singly would not make it good, for the crown cannot erect a new court contrary to the laws of the land, *Hob.* —, objected that different persons are to award the warrant, and administer the oath. The commissary might have a deputy. We take notice of the proceedings of the civil law, and a commissary may make a surrogate, who is in the nature of a deputy.

The difficulty is on the second point, Whether the defendants have brought themselves within the custom?—*Suspecting* is not *believing*, saying he suspects would not be well swearing, according to his estimation is sufficient, saying only *of and upon the premisses*, is a very strong objection, always fatal upon a conviction, where the party must swear the particulars; the words in manner aforesaid do not seem to refer to the custom, for it is said before the defendant offered to take oath of and upon the truth of the premisses according to his belief; but it does not appear what that was, whether the fact was true or false. There is nothing in the objection of not issuing the process in court or any day certain. The only objections which seem material are saying only the party suspected, and *de et super veritate premissorum*; the question then will be if this is a good justification as to any of the defendants? Though the custom is not pursued if the beadles and goaler had severed in pleading, they had been excused. It can hardly be maintained under the authority of *Gwynn v. Poole*, that the judge and plaintiff are not liable to an action, as they must be presumed consant of the custom.
Powell,

Powell, Justice, there says, he doubted whether an action would not lie for suing in an inferior court when the cause of action arose out of the jurisdiction.

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PAGE, Justice. It does not appear the commitment was to a prison within the jurisdiction; it is to the county goal; it is not reasonable that the party should be committed to any other place, if the case be not brought within the custom it is the same thing as if no custom at all; agreed to the difference in respect of an action lying or not between the party and officer. If the plea be bad as to one, it must be so as to all.

PROBYN, Justice. The custom may be good, but it is not well pursued;—here is an averment of the plaintiff's commitment to the place where they used to commit, and that is sufficient.

LEE, Justice. All the defendants are in the same condition, as they have joined in pleading. The principal point is, whether the action will lie against the judge and party; they cannot be supposed to be ignorant of the custom, and therefore they will not clash with *Gwynne* and *Poole*. What has been done is void, and so the parties trespassers. *Hob. 63.*

Adjourned for another argument on that last point only.

MR. DENISON for the defendant. As to the objection to the word *suspect*. That is supplied by the

1736. the words of the plea following, "Nor would the
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 against
 BOUCHER. said A. B. (meaning the defendant in the action below) legally appear if he was cited according to his belief but rather run away.

Lord HARDWICKE, that is not an independent member of the sentence, but the word *suspect* must in construction run through the whole sentence.

Mr. *Dennison*. The question then is, whether though the affidavit is not made pursuant to the custom this action will lie against the defendants? It appears that the place, the person and the cause of action was within the jurisdiction, therefore the issuing this warrant without a proper oath was not a *void* proceeding but an erroneous one only, 10 Co. 76. i Ventr. 263. The process must indeed be warranted according to the course of the court as in *Hob.* 63. there held that trespass lay for taking a person on a verbal command from a judge where the custom was to give a precept in writing. In that case there was no jurisdiction as to any such process; but here there was no defect of jurisdiction as to the warrant but only an irregularity in awarding it without a previous oath. *Roycroft v. Colecroft* in C. B. 1728, trespass and false imprisonment against the deputy recorder of *Grantham*.—Justification under the process of the courts replication that no affidavit of the cause of action according to the late act was filed previous to the issuing the writ. On demurrer thereto held that the action would not lie; a special action on the case a remedy here, the officer possibly not liable in this case

Fortes. 344.

case if he had pleaded separately, but with regard to the judge and the plaintiff it is clearly otherwise. In the case of an execution the officer may justify under the writ: The party must set out the judgment 2 Lutw. 1568, Salk. 408, *Philips v. Byron*, Hil. 8 Geo. 1. trespass against the plaintiff in the action and the officer for an execution on a judgment set aside before that time. Held clearly that the action lay against the party and the officer having joined in the same plea could not discharge himself. Trespass lies in all cases where the act done is in itself injurious. Actions on the case where it is injurious in its consequences. The case in *Hob.* 63. in point.

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1 Stra. 509.

The court unanimous that the principal case was not distinguishable from *Hob.* 63.

Judgment for plaintiff.

HARDWICKE said, that the defendants having all joined in one plea it was sufficient if one of them was liable to the action as the plaintiff below clearly was, and though not necessary to determine whether the judge was liable to it, yet he said he was of opinion that he was, who cannot but be presumed constant of his own method of proceeding.

Where defendants join in a plea which is bad as to one, it is bad as to all.

Judgment for plaintiff.

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against
PRITCHARD.

The KING against PRITCHARD.

A *mittimus* directed to the justices of the county palatine of Lancaster, and the *postea* named them justices at Lancaster,

not a fatal variance.—The mistake in a juror's name, if he be not one who tried the cause, does not make a mis-trial.—Inserting the names of a special jury in a pannel annexed to the writ, instead of inserting them in the *hab. corp.* is a defect amendable after verdict.

A VERDICT having been obtained against the defendant at the assize at *Lancaster*, in an information in the nature of a *quo warranto*, for the office of bailiff of *Liverpool*, amongst many other exceptions taken in arrest of judgment, these three were much insisted on,

First, That the *mittimus* is directed to "The justices of our county palatine of *Lancaster*," and in the *postea* they are only named "Justices at *Lancaster*," so that the commission does not appear to be executed by the persons to whom it was directed; justices at *Lancaster* may mean justices of the peace there.

The second, That one *William Hill* is returned in the pannel annexed to the *venite*, and in the *habeas corpora* he is named *William Kell*.

The third, That this being a special jury, their names ought to have been inserted in the body of the *habeas corpora*, and not on a pannel annexed, according to the direction of the late jury act, the case of special juries and trials at bar being excepted out of that act, and therefore the ancient method
of

of inserting their names in the *habeas corpora* should have been observed.

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At another day, on shewing cause it was insisted on as the established practice and usage of those courts to describe the justices in this manner, and many precedents to this purpose were laid before the court, that justices of the peace could not be intended here, the description of their commission being very different.

As to the second, an affidavit was read that *Hill* was the person struck by the master, and his name mistaken only in the *habeas corpora*; that it comes to the common case where twenty-three jurors only are returned; that is not fatal, especially here, it appearing he was not one of the persons who tried the information. *Cro. Eliz.* 586. *Crb. Jac.* 647. *Cro. Car.* 223. 5 *Co.* 37, 42. This defect, if any, aided by 18 *Eliz.* 13. 21 *Jac.* 1. 13. as it is made amendable.

As to the third objection, said it did not appear on record there was a special jury; for though the style of the panel annexed to the *habeas corpora*, is, viz. "The names of the persons, special jurors, returned," yet that by no means implies any such thing, and may be construed only, such particular persons; and if it is not to be taken as a special jury, then it being a want only of a sufficient number of jurors, is within the resolution of *Gardner's* case, 5 *Co.*

L.

Lord

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the justices acting in either of these capacities is the same, and there is no room to presume there is any other. The *habeas corpora* is the act of the court, the return of the panel the act of the sheriff; if the panel was annexed at the time of sealing, the writ of the panel might be taken as part of the writ, which I think cannot be, as the annexing it is the act of the sheriff.

LORD HARDWICKE, *Chief Justice*. The writ takes notice of and refers to the panel, and seems to be part of the writ.

PROBYN, *Justice*. As this power of the judge of ordering a fewer number of jurors than forty eight, comes in by way of exception to the general provision of the act, the execution of that power ought to appear upon record.

LEE, *Justice*. I doubt whether this third exception is proper on motion in arrest of judgment; it is true it appears by the record that less than forty eight are returned, that possibly by the order of the judge, and then no ground for the objection. This therefore is only proper to be enquired into on a motion for a new trial where the facts will be laid before the court. The words "special jurors" no warrant at all for raising a presumption of a special jury in this case; if taken as a special jury, the annexing the panel of the jurors names to the *habeas corpora*, instead of inserting them in the body of the writ, seems to be a defect in form only.

Lord

LORD HARDWICKE. If the words "special jurors" do not amount to a special jury, then indeed the objection is improper here; but it should be on motion for a new trial. The order of the judge, &c. cannot appear upon record, but it is matter of regularity or irregularity only, and to be inquired into that way.

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Adjourned, and on the last day of the term the rule was discharged.

The KING *against* PENELOPE SMITH.

AN *habeas corpus* having issued to bring up the body of one *James Smith* an infant, between thirteen and fourteen years old, who was in the custody of his aunt, and a general *paratum habeo* returned, without specifying any reason in the return for keeping him from his father, but that supplied by affidavits though of little or no consequence, and which was objected by Chief Justice as irregular, in supplying by affidavits what ought to have appeared on the return.

The intent of an *hab. corp.* is to provide against a restraint of liberty. But the court will not decide the right of guardianship over a minor, upon a return to an *hab. corp.* 2 Stra. 982. Cun. 72. S. C. 1 Stra. 444. 579. 3 Bur. 1434. 3 Co. 39. Ratcliffe's case.

Mr. *Bicknell* moved on the behalf of the father to have the child delivered over to him as the person by law entitled to the care and custody of him, 3 Co. 39. 3 State Tr. 78. what is there said by *Pemberton*, Chief Justice in *Lady Harriot Berkley's* case.

The King v *Johnson*, Hil. 10 G. 1. B. R. There, upon a dispute, the guardian of an infant of the age 2 Ld. Raym. 1333. 1 Stra. 579.

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age of nine years appointed by the father's will, and a *curator* appointed by the spiritual court, the child being brought into court on the return to a *hab. corp.* the court took the child out of the hands of the *curator* and delivered him over to the guardian.

On the other side was cited 2 *Lev.* 128, Sir *Robt. Viner's* case.

Lord HARDWICKE, *Chief Justice*, There being no justification returned for detaining this child he must certainly be left to his liberty as to his continuance with his aunt, but the question is, Whether the court ought to go farther and deliver him over to his father? I think we cannot. The only intent of an *hab. corp.* is to provide against any restraint of the party's liberty. In the case in 2 *Lev.* no more was done than to set the party at large: so in Lady *Catharine Annesley's* case, who being brought up by *babeas corpus*, the court would make no order for delivering her over to the Dutchess of *Buckingham*, her mother, though she had the same right of guardianship to the child as here, the father in that case being dead.

The case of the *King v. Johnson* is the only case I have heard of to the contrary, and I don't see how that can be right (a). How can we on motion

(a) Yet Lord MANSFIELD said it was *right* to let the *legal* guardian take her, as she was *too young to judge for herself*. The guardian appointed by the spiritual court was nothing at all: for they appoint any body guardian in that court, for the mere purpose of appearing. The *King v. Delaval.* 3 *Bur.* 1436.

tion try the right of guardianship? for that would be the consequence, which would disable the party from taking the opinion of a superior court by writ of error. I don't know but that the father may take the child wherever he finds him; however he has his remedy against any person who detains him illegally. He may bring his writ of raviishment of ward. There is an action too where the guardianship itself is recoverable, the writ *de ejectione custodiæ*: at this rate we are to do two acts upon this *hab. corp.* not only to discharge him from the custody of the first person, but likewise to commit him to the custody of another. Where a person is removed into this court by *habeas corpus*, we commit him to the custody of the marshal; but in case of removal from one prison to another, there must be one *habeas corpus ad deliberandum*, another *ad recipiendum*.

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The other judges concurred.

LEE, *Justice*, said the case of the *King v. Johnson* was ruled as cited at bar; but said Lord, RAYMOND, who was then one of the judges, told him, that upon consideration he thought the court did wrong in that case (*b*).

(*b*) *Vid.* 3 *Bur.* 1436 where Lord MANSFIELD says the case of *The King v. Smith*, was determined right, though he does not approve of all that was said. *Vid.* 1 *Bl. rep.* 413. S. C. *The King v. Ward*, 1 *Bl. rep.* 386. In the following case, which I add from my own notes, the court would not do any thing more than free the person from restraint.

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The KING v. EDGAR. B. R. *Westm. Hil.* 1789.

A writ of *habeas corpus* had been directed to *Alexander Edgar*, Esq. and his three sons, commanding them to produce the body of *Anne Edgar*, the wife of said *Alexander*; pursuant to which they brought her into court.

Erskine, on behalf of *Anne*.—We have an affidavit, stating that the lady was married to *Alexander Edgar*:—That her father left his property in trust for her, not having any confidence in her husband, who treated her with great severity:—Articles of separation were agreed upon, and in consideration of 3000*l.* he was to resign all claim to her property:— That he afterwards wished to get possession of her, which he effected, and kept her confined, alleging that she was a lunatick, and using her as no man can by law use his wife.—We have no affidavit from the lady herself, as we have had no access to her, and therefore though we cannot take her out of the custody of her husband (for which I could shew the court good reason) yet I wish that the court may order her to be kept in such a manner, that her solicitor and friends may have access to her.

Bearcroft, for the husband.—If this were the simple case of the husband living separate from the wife, it would be unnecessary to say any thing; but that is not the case; for although he admits that the articles were agreed upon, yet he says, that there were other articles to be executed, which never were executed—engagements to free him from such debts as she might contract. Besides this lady has desired to live with her husband, which she has done accordingly for two years.

Lord KENYON, *Chief Justice*. Unless she has done something notoriously to destroy the articles, it is settled that the husband has renounced all right to the wife.

Erskine. My wish is that the lady may be freed from the restraint of her husband, by which means we can have her affidavit,
that

that the case may not come lame and incomplete before the court.

Bearcroft. Let her be put in some third place; for she may get into improper hands, which for the sake of justice and decency, she ought not to do. I say for the sake of decency, having lived in open adultery with the man who has sworn her affidavit.

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THE KING
again?
SMITH.
1 Bur. 542.
The King v.
Lifter.
1 Stra. 478.

LORD KENYON. We cannot put her into custody:—The husband has no claim after the articles of separation.

Bearcroft. I agree to that; but when our affidavits are read, it will appear that there are no articles.

ASHMEAST, *Jusfic.* We cannot go into that now; we have heard enough to proceed to liberate her.

LORD KENYON then asked the lady if there was any place she wished to go to? She answered there was no particular place; but if the court pleased she would go into any genteel lodging, under the care of any servant the court might think proper to appoint:—To which his Lordship replied, you are now a free woman; you may go where you please, and if you are apprehensive of any violence, you shall have an officer of the court to protect you.

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RUSSEN
against
COLEBY.

RUSSEN against COLEBY.

ACTION of covenant on articles of agreement by which the plaintiff who was master of a vessel covenanted to make use of the same in the coal trade for the defendant's service, and among other things covenanted that during the twelve kalendar months, the time the vessel was hired for, he would pay all the seamen their wages yearly, in consideration whereof the defendant covenanted to pay the plaintiff 42l. every month during the year, the non payment of which is the breach assigned : To this the defendant pleads that the plaintiff did not pay the seamen according to his covenant, and to this plea a demurrer and joinder.

A. by articles of agreement covenants to make use of his ship in the coal trade for B. for 12 months and to pay the seamen's wages, in consideration whereof B. covenants to pay A. 42l. a month, the payment of the seamen is not a condition precedent.

Doug. 684.
1 Term.
Rep. 638.
4 Term.
Rep. 761.
1 H. Bl. 270.

Mr. *Robinson* for the plaintiff, insisted those were mutual covenants, and that though the words are "in consideration thereof," yet in the nature of the thing this could not be a condition precedent, for the payment of the seamen by the plaintiff is to be yearly; of the plaintiff by the defendant monthly, so that from the manner of the covenants it is impossible the performance of the act to be done by the plaintiff should be necessary to entitle him to an action against the defendant for not doing the act he had covenanted to do, and he cited the case of *Thorp v. Thorp*, 1 Salk. 171, where this distinction is taken by Holt, Chief Justice, in the resolution of that case.

Com. 98.
1 L. Raym.
235. 662.
Lutw. 249.
Holt. 29.
12 Mod. 445.

Mr

Mr. *Agar*, on the other side, *Wyvill* and *Stapleton*, *Trin.* 7 G. in C. B. where the plaintiff by deed covenanted to transfer the defendant 200l. S. S. Stock, and the defendant in consideration thereof the sum of 1360l. The breach alleged was the non-payment of this money. To this a trifling plea and demurrer thereto. The court of C. B. was of opinion, that the tender of this stock by the plaintiff to the defendant was necessary to entitle him to this action, and for want thereof judgment for the defendant, upon a writ of error in B. R. that judgment was reversed, because that court was of opinion that they were mutual covenants and no tender necessary, but the judgment in B. R. was reversed in the House of Lords on this point.

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 against
 COLEBY.
 8 Mod. 68.
 381.
 3 Bro. P. C.
 89.

Lord HARDWICKE, *Chief Justice*. There can be no condition precedent here for the reasons given, and the resolution in *Thorp v. Thorp* is certainly good law, for these cases do not so much depend on the manner of penning the covenants, as the nature of them.

In the case of *Wyvill v. Stapleton*, the reason the House of Lords went upon was, that it would be highly unreasonable the party should be compelled to pay his money without having the stock transferred to him or tendered, which was the consideration for paying the money, that at least the payment of the money and transfer of the stock ought to be concomitant acts.

The other judges concurring, judgment for plaintiff.

ROBINSON

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ROBINSON
against
BIZLEY.

ROBINSON against BIZLEY.

Nil debet held to be a bad plea to an action of debt upon a charter-party where several breaches were set out.
Cunn. 75.
S. C.

WRIT of error on a judgment in C. B. on debt on a charter-party for the penalty therein mentioned and several breaches assigned; *nil debet* pleaded, which the C. B. held an ill plea upon demurrer thereto and judgment for the plaintiff.

Mr. *Strange*, for the plaintiff in error, insisted that this action not being grounded merely on the deed but likewise on the breach of covenant which is matter of fact, this plea was not improper, 6 *Mod.* 127. 1 *Saxm.* 38. 21 *Hen.* 7. 14. 6.

8 *Mod.* 106.
323. 382.
2 *Stra.* 778.
2 *Ld. Raym.*
1500.
1 *Barn.* 15.

Mr. *Dennison contra.* The cases cited are where debt is brought on a judgment suggesting a *devastavit*, or in the case of an escape, there the record is matter of inducement only to the action and not to the ground of it; as here this matter was very solemnly settled in the case of *Warren v. Consett, Pasch. 1 Geo. 2.* writ of error of a judgment in C. B. in debt on a contract under hand and seal, whereby the defendant agreed to pay so much on having so many shares in the Welsh Copper Company transferred to him, *nil debet* pleaded and held ill upon the above cited distinction, and compared to an action of debt brought by the assignee on a bail bond.

The

The court clearly of that opinion.

Mr. *Strange* then excepted to the declaration that one of the breaches was not sufficiently set forth, and the court inclined to be of that opinion.

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ROBINSON
against
BIRBY.

To this Mr. *Dennison* said, any one breach well set out is sufficient to intitle the plaintiff to an action for the penalty and the assignment of the several branches is duplicity of pleading, only a matter of form of which no advantage can be taken, the defendant having pleaded over, but he ought to have demurred. The court of that opinion.

Judgment affirmed.

The KING against BIGAMAN and COCKERIL.

THIS was a motion for an information against the defendants, who were justices of peace for the borough of *Scarborough*, and the complaint is, that the plaintiff being convicted before them of a riot, they sent him to *Tork Castle*, the county prison, whereas they ought to have committed him to the corporation goal; and secondly, that they refused to accept of the bail which was offered them, and notwithstanding sent him to prison.

Although the conduct of a magistrate be not strictly legal, yet an information will not be granted, unless oppression was intended.

In shewing cause, the defendants offered in excuse to this charge, that the corporation goal was in possession of the other party, (there being a dispute

1 Bur. 556.
2 Bur. 650.
719. 1162.
3 Bur. 1716.
Doug. 587.
1 Term
Rep. 653.
2 Term
Rep. 190.

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pute in the corporation concerning the election of their magistrates, so that there were two sets of justices. &c.) and that if they had committed the plaintiff to that gaol, he would not have been received, and therefore they sent him to the county gaol.

As to the second charge, they alleged that the persons who were offered as bail, were accomplices with the plaintiff, and had been concerned in the same riot, for which reason they refused their bail.

Curia.

Though what the defendants have done in this case is not strictly according to law, as sending the plaintiff to the county gaol, which is not within their jurisdiction, and refusing to admit him to bail, yet as there does not appear that any oppression was intended, it will not be sufficient to grant an information; and without that circumstance the court always refuses an information against a minister of justice, for the plaintiff is not without other remedy.

Rule for information discharged (*d*).

(*d*) The KING against JOHNSON, B. R. Dublin, *Trin.* June
 21st 1794.

A conditional rule for an attachment against the defendant, a magistrate of the county *Tyrone*, had been obtained last *Hilary* term, upon the affidavit of *John Kildea*, which stated, that two persons (naming them) came to his house at eleven o'clock in the night of the 21st *May*, 1793, and *burglariously* entered his house, and forcibly and feloniously took away a quantity of furniture, and with arms
 and

and by force drove the family out of his house; and after they were turned out, one of the persons accused fired a shot at his family:—that immediately afterwards he proceeded to defendant, who is the next magistrate to prosecutor's place of residence, informed him of the nature of the offence, and required that what he stated might be taken down by the magistrate's clerk, and he would swear to them; that the defendant refused, saying the two men might be hanged:—that afterwards in the month of *August* following, he again applied to the defendant, that his examinations might be taken, which the prosecutor brought to him written in form, which the defendant also refused to take; that he believes the magistrate acted with a *corrupt view*, having sent for one of the party to dine with him, and told him what a friend he had been to him.

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J. Boyd and *Betty* now shewed cause upon the affidavit of the defendant.—He admits that the prosecutor came to offer examinations for a *burglary*, but that it did not appear to him (the magistrate) to be either *burglary* or *felony*, there being a replevin suit depending, and the furniture having been taken as a distress for rent; the conduct of the persons making the distress might have been improper, but as their offence did not appear to him to be either burglary or felony, he would not take the examinations offered, but he proposed to issue a summons to bring the parties before him, and to have an opportunity of examining into the matter.—Upon the second application, the magistrate was the more confirmed in his opinion, that it was a civil question of property; but however, he offered to take the prosecutor's examinations against the persons accused, for an illegal entry, which proposal the prosecutor declined, and would not swear to any other examinations than those he brought ready drawn up.—The attorney for the prosecutor wrote to the magistrate previous to the second application, and the letter, though it is conceived in a menacing style, admits that the dispute between the parties was a question of property merely:—as such therefore, and there being no corrupt motive whatever in the conduct of the magistrate, who denies the charge of inviting one of the persons accused to his house, there is no ground for an attachment.

L. Fox and *Mahaffey, contra.* The affidavit of the prosecutor shews that an explicit charge of burglary and felony was made before

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fore the magistrate, and offered to be verified upon oath; immediately after the transaction, the defendant is informed of the nature of the offence, and his reason for refusing the examination is, that if he took them, the *persons might be hanged*!—This charge is not denied at all.—Afterwards, in the month of *August*, the prosecutor applied a second time, because threats had been made use of to do him some bodily injury; he brought written examinations, containing a positive charge of *burglary* and *felony*, and desired that his complaint might be put in the usual course of trial;—the defendant again refused, because, indeed, he had been menaced by an attorney; but his defence now is, that he purposed to issue a summons, that is, to give the accused notice to fly the country, and evade their punishment:—where the defendant does not deny the charge, it is to be taken as confessed:—As to the charge of inviting one of the parties to dinner, he answers merely upon belief; he does not swear *positively*, that he offered to issue the summons, it is only as to his belief.—But another defence set up by the magistrate is a curious one; he says, that Mr. *Daniel*, another magistrate, resides *only three miles* from him, who might have been applied to; so that because the persons might have been hanged, he refers the task of taking the charge to another magistrate. As to the replevin, he says he heard of such a suit, without saying when it began, or what has become of it;—he had nothing to do with it, he was bound to take the examinations in some shape or other, for there could be no distress at such an hour of the night.

LORD CLONMELL, Ch. J. This is an application for an attachment against a magistrate for not taking examinations tendered by a party coming to complain to him, and undoubtedly the Court will at all times insist upon the magistrates in their respective counties doing their duty, otherwise their commissions would be superseded, and they would become utterly useless. I have invited these motions as often as I thought there was any foundation for them; if the magistrates do not perform their duty, the course is to apply against them, and the motions are always listened to:—the general course of justice requires it.—The late Mr. Justice ROBINSON always expected that the examinations should be offered to the next magistrate—why? because he best knew the character and circumstances of the person making them.—I will make another observation

observation;—the court will ever resist the trying of civil property in the grand-jury-room.

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Now see what the facts here are, upon the admission of the defendant, or his silence, which amounts to an admission in some cases, where the charges are positively made.—It is sworn that on the 21st of May 1793, two persons came to *Kildea's* house, and took away his furniture, an odd sort of theft, or burglary:—it is also complained, that they terrified the family, and fired a shot:—there is no doubt that a person having a *right* may enforce it by *wrong*:—But the question is, “Was the magistrate *corrupt*, or *grossly ignorant*?”—He enquired into the charge, and found it a matter of civil property.—I remember a case which came before me, where a woman swore against a man in the county *Meath* for attempting to take her away by force to defile her, I asked her when it happened; she said, *three weeks before the law-suit began between her father and the man she was swearing against!*—Nothing is more abused than examinations in this way; they are drawn up by persons not knowing the transaction, and are sworn to by marksmen.—It is objected here, that the magistrate said the men would be hanged—that was to shew the prosecutor he was proceeding too far:—then he applies again to lay a trap for the magistrate; but he would not take the examinations for the *burglary*;—he offered to take them for a *trespass*, which was exactly what he ought to have done. The prosecutor wished to deprive the accused of their liberty, the constant course is to swear a robbery for that purpose.

As to what the attorney has done, I think it only necessary to mention, under the authority of the case in *Burr.* that such conduct might subject him to the costs:—We are of opinion that the cause should be allowed with costs. 2 Bur. 654.

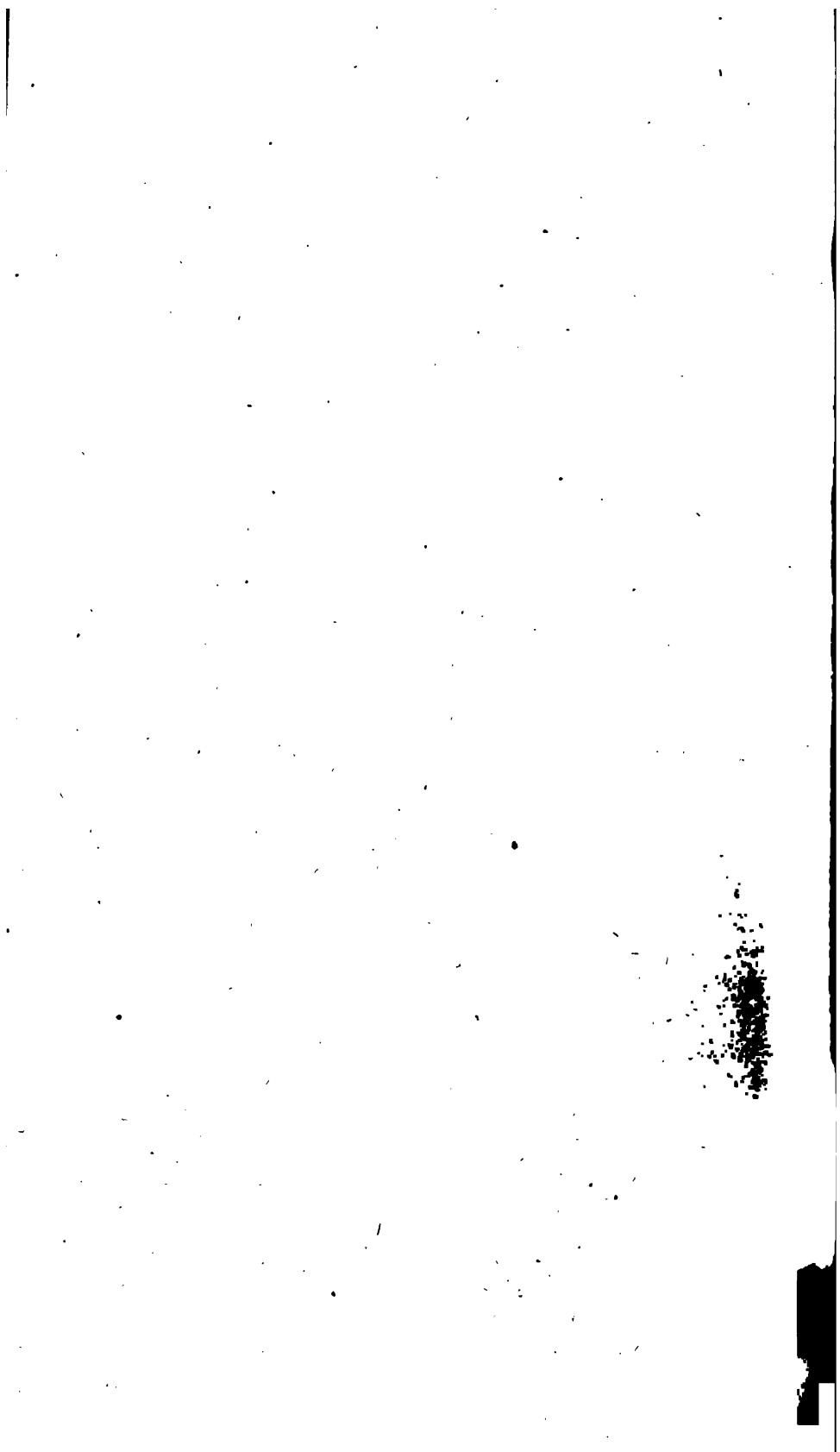
BOYD, J. said he would not give any opinion; not that he entertained any doubt as to the rule, but for particular reasons.

DOWNES, J. and CHAMBERLAINE, J. concurred with the Chief Justice.

Rule discharged.

M

PART



PART THE SECOND,

CONTAINING

C A S E S

IN THE

11. 1744.

HIGH

and PHILIP PIPPON, *Plaintiffs*, and
Others, *Plaintiffs*

6th June,
1744.

J. PIPPON, JANE PIPPON, Jo and
Others, *Defendants*

JOHN PIPPON, a native an
ersey, died intestate 18th Jul
children, nor any father or
her; all the plaintiffs,
nephews and nieces of
the two defendants
sisters.

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by simple contract from *Henry Durell of London*. Soon after the intestate's death, the plaintiffs the nephews and the nieces impowered the plaintiff *Davis* to take out of the prerogative court of *Canterbury* administration to the intestate for their benefit, which he accordingly did, and received the debt, part in specie, and part by the transfer of stock; afterwards the defendants having notice of said debt, and of the administration granted to *Davis*, the defendant *Hardy*, by their order, obtained a repeal of the letter of administration, and got administration granted to himself. *Davis*, before the repeal, sold the stock, and the present bill was brought by the nephews and nieces to have a distribution of the intestate's effects in this kingdom.

The defendants by their answer insist, That by the laws of *Jersey*, the personal estate is to be divided among the sisters in exclusion of the children of the deceased brothers and sisters, and therefore that the debt must be divided between the defendants, the intestate's sisters.

This cause was heard by consent upon bill and answer; Messrs. *Chute* and *Noel* for the plaintiffs. The defendants do not put their case upon the statute of distributions, but on the custom of *Jersey*, by which they insist, that the plaintiffs are incapable of taking any part of the intestate's estate, and the question in the cause will be, "Whether this custom shall affect the property of goods in this kingdom?" The distinction between debts due by specialty, and those due on simple contracts, is well known

known to be this, that the former are *bona notabilia* in the diocess where they are, but the latter follow the person of the debtor, and are *bona notabilia* where he dwells; they could not therefore have recovered this debt without taking out administration here, and upon taking out administration, they must have given a bond to the ordinary to make distribution according to the statute, and consequently this debt must be distributable according to the statute; but the defendants seem to insist upon a proviso or saving in the statute of the customs of *London*, and the province of *York*, and of other places, having known and received customs peculiar to them: but this proviso cannot be taken to extend to any places out of the kingdom, and therefore can be of no service to the defendants.—In the province of *York*, that third part which neither the wife nor children can claim by the custom, is distributable according to the statute. 2 *Vern.* 82. it is held that the customs of the province of *York* are local, and it is the locality of the effects that gives the spiritual court jurisdiction to grant administration: as the debt was here, they were obliged to take out administration in *England*, and the ordinary upon granting it is required to take a bond from the administrators to make distribution according to the statute, and it is very difficult to account for this method of proceeding, unless the effects are to be distributed according to our laws, and the contrary construction would entirely rescind all the provision and security required by the act of parliament; besides, the Court cannot take notice of the laws of *Jersey*.

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Cholmley v.
Cholmley.

Mr. Attorney

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Mr. *Attorney General*, for the defendants. The laws of *Jersey* are separate, distinct, and independent of the laws of *England*, though not of the legislature of *England*: This is insisted on by the defendant's answer, That by these laws the surviving sisters of an intestate are intitled to his personal estate, in exclusion of the children of his deceased brothers and sisters, and therefore that the plaintiffs are not entitled to any part of the intestate's estate: The plaintiffs have not replied to the answer, and therefore it must be taken to be true: It has been contended for the defendants, That the personal estate is merely local, and that the right the next of kin to an estate have to it, depends upon the locality of it, at the time of his death. I shall insist on the reverse of this proposition: They have not shewn any one instance in which the Court has considered it in the light they contend for; but all their instances, and the nature of the cases, prove the contrary. The nature of personal estate is that it attaches on the person, and the nature of a real estate is that it is attached to the place; because it is a fixed thing: The very meaning of personal estate is, that thing which belongs to the person; suppose a person is an inhabitant, and dies in the province of *York* and has *bona notabilia* in that province, and also in the province of *Canterbury*, there must be administration taken out in both provinces; and yet the person who took out administration in the province of *Canterbury* must make distribution according to the custom in that province.

Lord

LORD CHANCELLOR. That is a case directly within the proviso.

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Mr. Attorney. It is so; but the mere locality of the personal estate, does not create any right in respect to the distribution; the locality of the personal estate determines nothing but the jurisdiction that is to grant the administration; but the distribution depends upon the quality of the person, either as a freeman of *London*, which follows the person wheresoever he goes, or as inhabitant of this or that particular province.

LORD CHANCELLOR. *Hardy* the administrator, and all the persons intitled to the distribution live in *Jersey*; the administration to *Davis* being repealed, he is now become a debtor to *Hardy*, and the case is in the same situation as if the debt had continued in the hands of the original debtor. How can I decree an account to be taken here of the whole personal estate? And without that, how can it be known what will remain in the hands of the administrator after payment of the intestate's debts: It would affect the commerce of this kingdom to a very great degree; merchants abroad have debts here, and if those should be distributed according to the laws of *England*, it would be a most mischievous thing to the commerce of this country; and no distinction was ever made between the effects a man has here, and those he has abroad. In the case of *Van Thiennin* before Lord *King*, Colonel *Van Thiennin* brought his bill for a distribution of the effects of his late wife, which she was entitled to by a legacy from her first husband, and

2 Eq. Abr.
425.
Fitz-Gibb.
203.

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and an account was decreed; I was of counsel for the plaintiff, but was not satisfied with the decree; however, it was made by default, the principal defendant not having answered; but Mr. *Jacobson*, the trustee, was the only one who put in any answer; and that point, how far the laws of *England* attach on goods here, was mentioned, but not determined, the decree being made by default:—I had a great doubt about it in respect of the inconveniences it would bring upon trade; but besides that, it was a question about stock, which is a specific part of the personal estate, and may differ from the case of a mere debt, which follows the person of the debtor wherever he is.

Sel. Ca. in
Cha. 69.
2 Stra. 733.
2 Eq. Abr.
524.
Mofel. 1.

Mr. *Attorney*. Can it be supposed that the right of distribution should depend upon the removal of the debtor? The administration is nothing but an authority for the person to get in the effects of the interest. In the case of *Burrows v. Jemineau* 1726, in Chancery, a person drew a bill here upon a person at *Leghorn* who accepted there, and the drawer was a bankrupt in *London*, the acceptor had notice of it before the bill was payable; the acceptor was sued at *Leghorn*, and sentence was given for him; because by the laws used there, if a person accepts a bill of exchange and has no effects of the drawer in his hands nor notice of the bankruptcy, he is not liable: it happened that the acceptor came here and was sued at law, upon which he brought his bill in this court for relief, and an injunction, and he was relieved, and the court said that the acceptance at *Leghorn* bound the acceptor according to the laws of that place.

Lord

Lord CHANCELLOR. The strongest objection in that case was, that if it was right, it was only a conditional acceptance, and that advantage might be taken of it at law.

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Mr. Attorney cited the case of *Feaubert v. Turst*, to shew that the court will take notice of the laws of foreign nations.

Prec. Cha.

207.

2 Eq. abr.

475.

1 Bro P. C.

38.

Mr. Solicitor General on the same side. The court may dismiss the plaintiffs bill without going into the merits of the case, for the only way by which the present question is brought before the court is by the administration which the plaintiff fraudulently obtained to be granted to their attorney, which has been since repealed by the ecclesiastical court:—*Davis* having by false suggestions taken out letters of administration receives the debt and joins in the bill to prevent the true administrator from getting it out of his hands, and in this manner the cause is brought before the court: If this had not been done, the debt might have been paid to the administrators in *Jersey*, and then he would have made distribution according to the laws there. If that had been done this court would not have called that matter in question, and therefore it is owing to their fraudulently getting the money into their hands that the present question is brought before the court. This misbehaviour of theirs is not to be encouraged, and on that foundation the bill may be dismissed.

Lord CHANCELLOR. I would not, if I could void it with justice to the parties, enter into the general

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general question. It was admitted that *Davis* under the first administration, which is now repealed, received this debt; by that he is a debtor merely to the estate of the intestate, and he has nothing to do to come here, but ought to pay it over to the rightful administrator. The difficulty is with regard to the other co-plaintiffs, whether they have not a right to come here, not to call *Davis*, but to call *Hardy* to an account, for this particular part of the estate abstracted from the rest of it.

Mr. *Shute*. Mr. *Hardy* is now, and has been all along in *England*; he took out administration in person, and he answered under the process of this court: The effects are also here, and therefore the plaintiff's have a right to have the matter examined into in this court.

Lord CHANCELLOR. I am of opinion that there is not a sufficient ground for me to decree an account for the plaintiff: I am very unwilling to determine the general question, which may admit of a great variety of consideration, and of difficulty too, therefore I chuse to determine the case without entering into it; if I was to enter into it, I should think, that a man's personal estate is supposed to follow his person, wherever he is; and is distributable according to the laws of that country where his person is, and as to the different jurisdictions relating to his personal estate in respect of the probate of wills or administration they arise from the nature of the remedy that is to be made use of for the recovery of that estate, and therefore to enable a person

A man's personal estate is supposed to follow his person, and distributable according to the laws of the country where he is.

a person to sue for any part of the personal estate he must qualify himself from that which is the proper jurisdiction of the place where the personal estate lies; but that does not determine the right to the equitable property, or to that property which is considered in equity or in the canon, or ecclesiastical law, in distributing the shares of that personal estate, and therefore the cases which have been put are right, and prove this, if a man be an inhabitant of the province of *York*, and dies there, leaving goods both in that province, and also in the province of *Canterbury*, it is incumbent on his administrator to take out administration in both provinces, and yet notwithstanding this, the whole personal estate will be distributable according to the custom of the province of *York*, which shews that it is not the jurisdiction out of which the administration must be taken, which is necessary to give the party a right to one that will govern the right and interest in the distributory part of that estate. —Then consider the present case, it is rightly said, that *Jersey* must be as much considered a foreign country in respect to the laws of *England*, as if it was not parcel of the crown of *England*, for it is not part of the kingdom of *Great Britain*, but it is a distinct dominion which the king of *Great Britain* is intitled to in right of his Dutchy of *Normandy*, consequently is governed by the ancient laws of *Normandy*. Then the case is thus: A man is an inhabitant and dies in a foreign country, the bulk of his personal estate there, he happens to have a debt owing to him in *England*, which cannot be recovered without taking out administration in *England*, the question

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1 Bl. Com.
106.

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question is, whether that shall be considered as part of the bulk of his personal estate, to be accounted for according to the laws of the place where he is resident, or whether any persons not residing in *England*, but inhabitants of a foreign country, who by the laws of that country have no right to any part, but would have a right by the laws of *England*, can come into this court, and by the reason of the taking out of administration here can compel the administrator to recount to them for that part of the personal estate abstracted from the residue of the estate? If that was the mere question before me I should incline to think (but I don't mean to give an opinion to bind me) that it could not be done, and would be extremely mischievous and greatly affect the commerce of those kingdoms; no foreign merchant would know how to deal here but at the peril of having all his debt here separated from the rest of his personal estate, and distributed according to the laws of this kingdom.

The bond required by the act is that the administrator shall account before the judge of the ecclesiastical court, and pay the residue of the intestate's goods, and chattles, and credits to such persons as the said Judge or Judges shall appoint pursuant to the said statute:—What is it that is to be distributed?—It is the rest and residue of the personal estate after debts paid, and other allowances, no body can come here for an account of part of the estate, but must pray an account of the whole estate; how can this residue be made appear but by accounting for the whole estate, and not by an account of a particular

cular debt only?—And therefore on the words of the statute I should think there would be no such decree as is now prayed, and do but consider what work it would make; the general administrator is not before the court; How can I decree an account of the whole estate, and without it I cannot find out the residue, and if the general administrator was before the court, I might decree an account, but the consequence of it would be that if the administrator accounts here and has such allowances and makes such distributions as are agreeable to the laws of *England*, the courts in *Jersey* might decree him to account with different allowances and different distributions: But the only matter now to be determined is, whether the present bill is properly brought?—The first administration is repealed, and a new one granted; and as to *Davis* being a plaintiff, the bill is improper; for he is now only a debtor to the estate, and consequently a debtor to the second administrator; what has he to do to come here to pray an account to be taken?—He is a debtor to the estate and liable to an action at law by the administrator, who may the next day he recovers, carry it into *Jersey* and account for it there, and that would be the right way. *Davis* is therefore to be laid out of the case; and in respect to the other plaintiffs they have nothing to do to come here, for an account of this particular part of the personal estate:—They have a right to call the general administrator to an account, but no person intitled to a share of the residue of the estate can come into this court for a particular part of that estate detached from the rest, the general administrator

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strator is not before the court, and therefore I cannot decree an account; therefore the bill must be dismissed.

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Where the deeds under which a plaintiff in ejectment claims are in the possession of the defendant and the former is obliged to come into equity for a discovery he will be decreed to an account of the rents and profits from the time his title accrued.

2 Atk. 282.

3 Atk. 124.

S. C.

4 Bro. P. C.

353. 405.

2 Stra. 1086.

13 Vin. 292.

ca. 23.

18 Vin. 413.

ca. 8.

Fearne's C.

R. 155.

THE plaintiff brought a bill for a discovery of a deed of settlement in the custody of the defendant, and to have the same produced at a trial in ejectment depending between the parties, and in the bill the plaintiff prayed relief *generally*, and afterwards the plaintiff brought a supplemental bill for an account of the rents and profits of the estate from the time his title accrued, which was upon the death of his father in 1729:—the plaintiff had recovered possession of the premises by a judgment in the King's Bench upon a special verdict in ejectment, which judgment was affirmed by the House of Lords.

Mr. *Brown* for the defendant. The only relief sought by the original bill is to have the deeds produced upon a trial at law, and the plaintiff does not apply to the court to have any part of his title determined here, nor does he so much as charge the defendant with being in possession of the estate; it is true where this court determines the right of the parties, it will also determine every thing that is consequential or incidental thereto; the plaintiff has chosen to have his title determined at law, and came here for no other end but merely to have the deeds

deeds produced, and the term set out of his way, and the court will not make itself ancillary to the courts of law, and take for granted that their determinations are right, and upon that footing only to decree an account. The first ejectment was brought in 1731, and if the plaintiff had made an entry before he brought the ejectment he might at law have recovered the mesne profits, and since it was his own blunder only, that disabled him from recovering at law, this court will not give any relief:—all the cases wherein this court has entertained a jurisdiction of this sort are, either such wherein the very *right* of the estate was determined here, or else they are such as fall under the head of *frauds*, or *trusts*. The case of *Coventry v. Hall* was simply on a defective conveyance, and no doubt but that wherever a man cannot establish his title without the aid of this court, there is a proper jurisdiction for this court to decree an account:—In the case of *Bennet v. Whitehead*, there were particular circumstances of fraud in the defendant, which made it proper to decree an account; the defendant there continued the possession of a leasehold estate after the lease was expired under pretence that he was intitled to the inheritance, though he had in his custody the deeds that made out the plaintiff's title, the concealment of these deeds was a gross fraud in the defendant, but there is nothing like that in the present case. The plaintiff was not ignorant of the deed, as appears by his own bill in which he states the limitations and words of it exactly as they are, and the detaining the deed from the plaintiff cannot be considered as a fraud because the defendant's have been a long while in possession of the

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2 Cha. ca.
134.

2 Wms. 644.

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estate, and believe themselves to be intitled thereto, though the determination at law has been since against them. But this court cannot take the right of the estate to be absolutely decided; there has been, it is true, one judgment in ejectment, but can this court consider that to be decisive, when the courts of law do not look on it to be so?—The defendants may bring new ejectments, and one has been actually brought and is still depending:—Was there ever any instance wherein this court has granted a perpetual injunction merely because the party had obtained one judgment in ejectment?—Such injunctions are never granted except where there has been great vexation and many judgments obtained: If these deeds are decreed to be delivered up, it will be impossible for the defendant ever to try their right any more, and therefore will in effect be granting a perpetual injunction. But it is objected, that this case must be considered as connected with the original bill, because the present bill is brought to have a more complete relief, than the court gave on the original decree: But this second bill consists intirely of new matter, and of things altogether independent of the former, and therefore though they call it a *supplemental* bill, yet it is not to be considered as such: For supplemental bills are grounded upon the relief originally prayed, and are brought to extend that relief further.—But it is said, that since there is a *general prayer for relief* in the original bill, the plaintiff may pray *any relief* afterwards. If this was allowed, it would be impossible to make any defence against a bill praying generally relief. The present bill is brought merely for an account of the rents and profits,

profits, without giving the court any other jurisdiction, but by the former bill which is satisfied; and this court never decrees an account but where the right itself has been decreed here, except in cases of *frauds, trusts, and infancy*: The plaintiff has elected to proceed throughout at law, and has put his case intirely on the rules of law, and made an actual entry in the year 1735, which shews that he intended to proceed at law for the mesne profits. 1 *Vern.* 105. has been cited to prove that the plaintiff may proceed in an ejectment at law for the possession, and equity for the mesne profits, but that must be mistake, for I believe it never was done. But if the party comes here, he must come for the whole. As to the case of the Duke of Bolton v. Dean, there a tenant continued in possession after the lease was expired under a belief that one of the *cestui que vies* in the lease was alive, but afterwards discovering his mistake delivered up possession to the duke, who brought a bill for the mesne profits which were decreed to be accounted for by the defendant. But there are very particular circumstances in that case, for the mistake arose from an accident of there being two persons of the same name with one of the *cestui que vies*, and *accident* is one ground for relief in this court. Besides as the possession was delivered to the Duke, he could not have gone to law for the possession, and therefore could not at law recover the mesne profits. But this was the only court in which he could proceed for them. The first period of time from which the plaintiff prays an account is from 1729, when his father died, he might have made an entry at that time, and then he would have been intitled to them at

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law; if he has not done it, there is no ground for this court to relieve him. The next period of time from which he prays an account is from the time of filing the original bill. But there is no reason for that, because it was brought for another purpose, and has no relation to this matter. The last period of time is from the entry in 1735; but for this they may have their remedy at law, and therefore there is no ground for the interposition of this court.

LORD CHANCELLOR. There are two general questions in the case: First, Whether the plaintiff is entitled to have an account of the rents and profits? Secondly, If he be entitled, from what time? The first of these questions properly divides itself into two others: First, Whether the plaintiff on the fact of his general right to the estate, is entitled to the rents and profits? Secondly, Whether he has a right to demand them in this court.

As to the first, nothing is clearer than that in law and equity, and in natural justice, the plaintiff hath a right to the rents and profits of the estate, and had that right from the time of his father's death, when his title accrued, if he cannot come at them, it must be because some rule of law or equity prevents him from having them: for the estate was his from that time, and consequently, that draws the right of the rents and profits.—The plaintiff's title is as heir to his father, who claimed by a remainder in a marriage-settlement made in 1662, by which Mr. Justice *Dormer*, who is the last person that died possessed, was only tenant for 99 years.
if

if he so long lived, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail; Mr. Justice *Dormer* had only one son, who joined with him in a fine of the estate, and also in a recovery, in which the son was vouched, and afterwards the son died in the lifetime of his father, and on the death of Mr. Justice *Dormer*, the plaintiff's father became entitled to the estate, and from that time has a right to the profits; but the defendants were in possession of the estate, and that, as has been objected, under such a title as the persons who made it might have made good, if they had taken a proper method, either by getting the trustees to join with them, or else by executing a feoffment to make a tenant to the *præcipe*.

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As to the first of these methods, it is very uncertain whether they could have done it. Trustees to preserve contingent remainders in a marriage-settlement, would have been extremely cautious how they had joined in such an act as that: as to the other method, that might have done it; but that is only saying that they have not done it, but might by another method which the law calls a *wrong*:—they might have done it, because such feoffment as that would have had its effect only by operating as a disseisin of the trustees, and operating by way of disseisin, it would have gained a freehold, and have made a tenant to the *præcipe* by *wrong*: there is no reason for any favour from thence, because it was a method which both in law and equity is considered as a *wrong*; therefore on the first branch of the question, nothing is clearer than that from the

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the time of the title accrued the plaintiff had a right to the rents of the estate.

The next branch of the question is more material and considerable, that is, whether he has a right to demand an account of the rents in this court,—and I am of opinion that he has; it is admitted on the part of the defendant, that there are several cases under certain circumstances in which this court will decree an account of rents and profits, and that too from the time that the right of the party accrued: on the other hand there are several cases in which the court will not do it, and therefore I can by no means agree to that short note that has been cited from *Vernon* 115, in the latitude and generality in which it is there laid down; for in that latitude it is not true. For if a man brings a bill in this court to have the possession of lands, and an account of the profits, and likewise brings an ejectment for that estate; if there is nothing more in the case, the court will not let him divide it, but put him to his election to proceed here, or at law. If he can recover by a legal title, he may also at law have an action for the mesne profits; therefore that case must have been some case of a particular kind: as suppose a bill brought by an infant by *prochein amy*, for possession and account of profits, and that infant does also bring an ejectment, possibly in that case, as he had a right to come here, the court might suffer him to proceed at law for the possession, and to retain his bill here for the mesne profits; it must have been some such case as that: but notwithstanding this, there are several cases in which this court decrees an account of

Where a man proceeds at law and in equity, unless there are special circumstances, this court will put him to his election.

An infant, though he recovers possession by law, may have his bill retained in equity, for the mesne profits.

of the rents and profits from the time of the title accrued:—First, wherever a bill is brought for possession and an account of rents and profits, and the title is determined here for the plaintiff, he shall have a decree not only for the possession, but also for the mesne profits, unless there be some special reason to restrain the time, as in many cases there are, to the time of filing the bill; as where the defendant had no notice at all of the plaintiff's title, either given him by the plaintiff, or by demand of the possession, and had no deeds or writings in his own custody, which shewed the title of the plaintiff, but the same appeared by deeds in the custody of the plaintiff or a stranger, or by proof made in the cause by the plaintiffs; in such case the court will restrain the account of the profits to the time of bringing the bill, considering it like the case of an entry in ejectment.

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Where defendant had no notice of the plaintiff's title, nor had any of the deeds in his custody, equity will decree an account only from the time of filing the bill.

So if there hath been any *default* in the plaintiff that he hath had a long while notice of his title, and hath lain by: In that case, the court hath often thought fit not to run backward into a long account, but to restrain it to the time of filing the bill.

So if plaintiff hath lain by.

So, where an infant brings a bill to have possession of an estate, and an account of the profits, the court will not only decree the possession, but likewise an account from the time of the title accrued, and that though it is merely a legal title;—that is the general rule, though special circumstances may vary it:

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Where a plaintiff has been kept out of possession by the fraud, concealment, or misrepresentation of defendant, upon a bill in equity for discovery and relief, an account of the profits will be decreed from the time of the title accrued.

The reason why the court entertains bills of that kind in case of infants, is, that every person who enters on the estate of an infant, as he cannot take care of himself, is presumed to enter as guardian or bailiff; and if the receipt of the rents began during the infancy, the court will carry it on after the time of his coming to age, and make one entire decree for the whole;—and in all cases wherever the plaintiff hath been kept out of possession, either by the *fraud, misrepresentation, or concealment* of the defendant, if the plaintiff brings his bill for a discovery and relief, though he hath a legal title, yet the court, if it determines that legal title either with or without the assistance of a court of law, will decree an account from the time of the title accrued.

Another instance of this kind is, if a widow is intitled to dower, and her claim is merely on a legal title, but she cannot discover the particular lands of which she is dowable, and a question arise whether she is intitled by law to dower, this court will assist her to find out the lands, and will direct her to proceed in a writ of dower, and reserve the consideration of all further directions; and when she comes back here, if her title of dower is established at law, the court will decree an account not only from the time of her demand, which would be all she could have at law, but from the time of the title accrued. This is the common relief, and goes farther than the statute, which only gives her damages from the time of her demand (e): and it might

9 Hen. 3.
c. 1.

(e) This agrees with the report by *Atk.* which however the master of the rolls said must be a misconception. *Curtis v. Curtis*, 2 Bro. Cha. 633.

might be said that the bringing the bill is a demand of dower, and therefore that she should have an account, only from that time; but this court does not do that, but says, as she is entitled to dower, she is in equity entitled to the profits from the time of the title accrued.

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Suppose a widow is entitled to dower of an estate upon which a term for years is standing out, and her title out of the reversion is a mere legal title, and she comes here to have the term set out of the way, and to have her dower assigned, though there was nothing more than that in the case, the court would decree an account of the profits from the time of the title accrued; and yet if the term had been out of the case, and she had proceeded at law, she could have recovered damages only from the time of the demand of her dower: these are all clear cases, and often determined.

Then consider how far the present comes up to these cases: First, It appears that *the settlement* under which the plaintiff's title arises *was in the hands of the defendants*;—there were four parts of them, all in his custody; and the plaintiff could not possibly come at them but by bill in this court (a); the deeds and evidences that verify the plaintiff's title being concealed by the defendant from the plaintiff, (though possibly not fraudulently concealed) is a strong reason why the court should give the plaintiff the same benefit which he might have had, if the

(a) *Vid.* 4 Bro. P. C. 355. where it is stated that the plaintiff was forced to litigate three years in the Court of Chancery, to obtain a discovery of the settlement, which was in the hands of the defendants, who used all manner of dilatories to avoid producing it.

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the deeds had been in his own custody, and if he had had them, he might have brought an ejectment immediately on the death of his father, and laid the demise from his father's death, and then he would at law have recovered all the mesne profits.

It is true that the plaintiff brought an ejectment before such time as he had the deeds, and before he filed his bill; and from hence it has been inferred that he did not want them; for, that it appears by his bill that he was acquainted with the contents of them; but that was by guess and conjecture only, and not with any certainty;—in the original bill there is no charge whatever of a term for years which was standing out in trustees, which would have been the STRONGEST GROUND for his coming here, and if it had been known, would certainly have been charged in the bill. This shews that the plaintiff did not know what the deed contained until it was read in court, and though he brought his ejectment, yet he brought it at random and at a venture; that is one ground why this court should decree an account, that all the parts of the title deeds of the plaintiff were in the hands of the defendant, and proved to be so in the manner of bringing his bill.

Where the plaintiff's title is an equitable one, he shall recover the profits from the time of the title accrued.

Another ground, and that a strong one for the plaintiff, is, that this is to all material purposes an *equitable title*; here is the legal estate of a term of 200 years standing out in trustees antecedent to the plaintiff's title; and the term now appearing to be attendant on the inheritance: this was a plain bar in his way at law, and yet he does not appear to be

be conusant of it; for that reason Lord TALBOT retained the bill for twelve months, with leave for the plaintiff to proceed in this or in any other ejectment, because this being brought at random, there might be occasion to bring a new ejectment, and to vary the manner of laying the demise.

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If the plaintiff had known of this term, he had a right to have brought his bill in this court against the trustees for a conveyance of it from them: It is true, that his right to that conveyance would have depended upon his right to the reversion, but then this court would have directed a trial at law to have ascertained his right to the reversion, and have ordered that the term should not be given in evidence; and when the plaintiff's right had been established at law, this court would have decreed the trustees to have conveyed it to him.

But notwithstanding these points are with the plaintiff, that he had a right to the profits from the time of his title accrued, and likewise that this court has a jurisdiction to decree them, yet still if the plaintiff hath not taken the proper method to bring it before the court, this court will not do it.

And that brings me to my next consideration, Whether the plaintiff hath not taken the proper remedy to have a decree for an account of the rents? And that depends on two things: First, On the original bill, on which further directions are reserved by Lord TALBOT; and secondly, On this supplemental bill. As to the original bill, it was insisted upon, for the defendant, that the plaintiff
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1 Cha. Ca.
 11.
 1 Vern. 247.
 Mosel. 192.

is not intitled to have a decree for an account of the rents and profits, because it is a bill brought for another purpose, and no such relief is prayed by it, but only a *general prayer of relief*, which *Dolben* used to say was the best prayer, except the Lord's Prayer. It was said for the defendant, that the bill was only for the deed to be produced at a trial at law, and not at all to have the right determined in this court: and to be sure the bill is inartificially and defectively drawn, for want of so particular and full a charge as might have been; but it insists on the defendants being in possession, which is admitted by the answer of one of them: It prays a discovery of the deeds, and that the plaintiff may have the benefit of them; an affidavit is annexed to the bill, by which the plaintiff swears, that the deed is out of his possession, and that, as he is informed and believes, it is in the possession of the defendant. That shews the nature of this bill, for the rule of this court is, that a man who brings a bill for the discovery and production of a deed at a trial, need not annex any affidavit to the bill, for that is only required where the bill seeks relief: as there is such an affidavit here, I must construe the prayer of general relief according to the nature of the bill; and the prayer of *general relief* takes in *all the relief necessary* at the hearing of the cause: if the plaintiff had in his first bill brought the trustees of the term before the court, if the plaintiff's right to the reversion had been a clear point, the court would have decreed the trustees to have conveyed to the plaintiff, and possession of the estate to be delivered to him:—Must there not necessarily have been an account of the rents and profits? Lord TALBOT ordered

dered the deeds to be produced at the trial, with liberty for the plaintiff to proceed in this or any other ejectment, and that the term should be set out of the way, and hath reserved all further directions: and therefore I think that every matter incident to this cause is within the compass of further directions reserved by the decree in the original cause, and that it is impossible to say, that the relief sought by the original bill must be confined to the discovery and production of the deeds.

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But supposing the original bill to be as defective as the counsel for the defendants say it is, in not praying an account of the rents, yet that matter is now properly brought before the court; for nothing is more common than after a decree for account to bring a supplemental bill in aid of that account, that there may be complete justice done at once, and to prevent multiplicity of suits, and various takings of accounts, and therefore I am of opinion that the plaintiff either on the footing of the original bill, or of the supplemental bill, which must be connected with, and considered as part of it, is entitled to this account.

Several cases have been cited, but all of them for the plaintiff. The case of *Coventry* against *Hall*, 2 *Chan. Rep.* 259. 2 *Chan. Cas.* 134. That was a bill by a person who had a conveyance of an estate, which was defective in law, to be relieved and let into possession, which was decreed, and afterwards a supplemental bill was brought for the mesne profits, which were decreed. That case is very material

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terial in respect to the point of connecting the supplemental with the original bill ; on the other points of the case it does not hold as an authority, because it was a title in equity, and so not liable to the objection in the present case of its being a mere legal title.

Another case cited is the case of the Duke of Bolton v Deane, *Preced. in Chan.* 516. in answer to that case it was said for the defendants, that the Duke could have no remedy at law for the mesne profits, because the possession had been delivered to the Duke: that is no reason against his having a remedy for them, for I do not know that the Duke could be said to be out of possession, if his tenant held over his term, I should think that he might have had an action of trespass for the mesne profits ; but it is a stronger case than the present, for the tenant was in no fault, but continued the possession merely through a mistake ; yet an account was decreed from the time of the title accrued, and the like decree was made in the case of *Bennet v. Whitehead*, and on this foundation, because the deeds that shewed the plaintiff's title were in the custody of the defendant, which reason holds in the present case.

But still it is objected, that where a man is *bonâ fide possessor* (a), he shall not account for the profits, neither

(a) *Potest dividi possessionis genus in duas species, ut possideatur aut bonâ fide, aut non bonâ fide.* l. 8. § 22. ff. *de acq. vel. amitt. posses.* Mr. Atkyns, in his report states the expression used by Lord HARDWICKE to be *bonæ fidei possessor*, which I should suppose is a mistake.

neither by the rule of the civil law, nor of this court, that is a rule that holds more strongly in the civil, than in our law ; but it is not applicable to the present case, but only to cases where the possessor hath no notice of the title of the other party ; every body is bound to take notice of the law ; the legal title of this estate was in the plaintiff, and the deeds that proved it were with the defendant, and therefore the fraud is not imputable to him, yet he cannot be so far considered as a *possessor bonâ fide*, as to excuse him from accounting for the profits, for he ought in conscience to have delivered up the estate to the plaintiffs.

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Another objection is, that though the plaintiff hath obtained a judgment in ejectment in the King's Bench, which has been affirmed in the House of Lords, yet this is not final, and therefore the court cannot take it, that this title is fully determined ; for new ejectments may be brought, and there is one actually now depending, and this court will only decree an account in such instances where it would grant a perpetual injunction.—That would exceedingly narrow the jurisdiction of this court ; injunctions are never granted but after many trials, and to prevent vexation arising from the method of trying titles by ejectment : Suppose an infant should bring a bill on a mere legal title for the possession, and an account of the rents of an estate, this is a mere ejectment bill, but indulged to an infant, for the reasons I have mentioned :—Suppose the court should direct a trial in ejectment, and a verdict should be found for the infant, the court would

2 Ves. 552.

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 DORMER. injunction, for the defendant, might still bring a
 against new ejectment, if he could find out a new title.
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2 Bro. Cha. Suppose an heir at law brings a bill here against
 620. a devisee for a discovery of deeds, and to be relieved
 Fonbl. Eq. against the will; and suppose a trial at law is
 12. 13. 147. directed and found for the heir on the equity reserved, he shall have a decree for an account and for the deeds, and yet the devisee, if he can mend his case, may bring a new ejectment; it would be a strange rule if, when this court hath retained the bill, and the plaintiff here hath recovered at law, that this court should not decree relief, by reason of the possibility of a new ejectment being brought or a new title being discovered, it would be putting things in suspense for ever (a).

(a) This doctrine was very fully discussed in the case of *Barnewall v. Barnewall*, House of Lords in *Ireland*, Feb. 1794, in which Lord FITZ-GIBBON, C. held, That the suit for the recovery of the possession is properly cognizable in a court of equity, and the plaintiff shall obtain a decree for the possession there, the court will direct an account of rents and profits as incident to the relief, which was originally a proper subject of equitable jurisdiction.— But as a man having a mere legal title to the possession, has no right to come into equity for the recovery of it,—so if he has originally recovered the possession at law, he has no manner of right to proceed by bill for an account of rents and profits:—As his title to the possession was at law, he must proceed for the whole there.—But if a party is obliged to come into a court of equity for aid to enable him to prosecute his title at law, after possession recovered at law, there may be cases in which he may come back for an account of rents and profits in the suit depending in equity.—So if he has been prevented from entering by fraud, a bill in equity will lie for an account of rents and profits during the fraudulent possession held against him.

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against
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WARD against SYKES.

EXAMINATIONS taken by order of this court *de bene esse* cannot be published without motion, on affidavit, that the witness is either dead or beyond seas, and afterwards at the trial the judge will not suffer them to be read without proof by oath of death or absence beyond sea, although publication has passed in this court.

An affidavit of the death or absence beyond sea of the witness is necessary before examinations *de bene esse* can be published.

NEAL and ———

MOTION of course was made for liberty for sequestrators to set and let.

Notice is necessary of a motion for sequestrators to set.

LORD CHANCELLOR. I cannot allow this without notice to the other side, for though it is a motion of course to obtain liberty for a receiver to set and to let, and now most orders are drawn up with such express power in them, yet the reason of both of them is, that he is appointed by the court for the management of the estate; but sequestra-

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tors

—But a man having recovered possession in an ejectment, cannot afterwards be received to file an original bill in a court of equity for an account of rents and profits during the tortious possession held against him

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BRADLEY'S
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tors have but precarious or temporary powers to levy a debt, and the sequestrator may be taken off to-morrow.

BRADLEY and

A promise to pay a debt out of a sum due by a 3rd person does not create a specific lien upon such sum.

THIS was a bill brought by *A.* against *B.* and one of his debtors, that the court would stay the money in the debtor's hands, and not to suffer him to pay it to *B.* for fear of his misapplying it, *B.* having promised to pay the plaintiff's demands out of such specific debt.

But the CHANCELLOR refused it clearly, and would not suffer it to be argued, because the plaintiffs as creditors of *A. B.* had no specific lien upon such debt as they insist upon, and that he would not lay such embargoes upon persons to prevent their paying their debts: For the consequences of such decrees would be a great stagnation of commerce, and repugnant to that course of circulation, which the well being of trade demanded, that if a man was indebted to another, and had a suit depending and promised to pay him out of the money to be recovered upon such suit, and the creditor upon the faith of such promise forbore to sue him, yet all this will create no specific lien on the money recovered. Suppose the question arose upon a real estate, and the debtor promised to pay this creditor his demand, who upon this confidence forbears distressing him, if the debtor recovers the estate, yet his creditor

ditor has no specific lien on it, even before the statute of frauds, much less since :—It is common for persons who have expectations from the deaths of their friends to promise to pay their debts out of such legacies, yet such promises will not bind such legacies specifically, notwithstanding such creditors might think they had right to such an express lien by virtue of their forbearance.

1744
BRADLEY'S
CASE.

ERRINGTON *against* WERG.

Feb. 20th.

THE plaintiff's father having a fee simple estate of 1000l. a year, and about 6000l. in money, and being an inhabitant of the province of *York*, before his marriage with Mrs. *Beacon*, settled all his real estate upon himself for life, remainder of part to his wife for her jointure, remainder as to the whole to his first son in tail, who happened to be the plaintiff, remainder to the father's own right heirs :—The father also covenanted to realize in trustees names the 6000l. and his wife's fortune to the same use as above.

By the custom of *York*, when a real estate descends upon the heir he cannot have a customary part of the personal property.

2 Vern. 48.
Swinb. part.
3. 1. 18.

The father after marriage made a small purchase in his own name to the value of about 15000l, but it did not appear, whether this purchase was made with part of the trust money or not. The father died intestate, and at law this new purchase descended upon the plaintiff, as his heir ; the father having saved a considerable personal estate, the question between his son and widow was, whether the son

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 against
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should not be totally excluded from any share of the personal estate under the custom of the province of York?

The consequences of the question being determined either way, would be these:—If the son is to be excluded of his customary share, and being an only child, the widow will have one moiety of the whole personal estate by the custom, and would come in along with the son for the other proportion of the other moiety under the statute of distribution, but if the son is not barred of his customary share, his mother will be intitled to only one third of the personalty under the custom, the son to another third, and the remaining third to be divided between them in such shares as the statute of distribution gives them.

It was insisted upon, that the plaintiff was excluded his customary share two ways, the first, by having the new purchased estate descend to him as heir of his father, the other that he would be excluded as heir to his father although no estate descended to him:—As to the first they considered it in two views, if it was not purchased out of the trust money, then it descended beneficially to the plaintiff on his own right, and to his own use, without being subject to any trust: and if that was so, it was clear that he would be excluded; and for that end they cited the case of *Trotter v. Collinson*, a few years ago, which was an issue directed out of this court and tried at York, and the provincial custom found that an heir was excluded from any customary share of the personal estate of his father where the real

real estate descended to him, and there was much proof in this cause to the same purpose.

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against
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My Lord CHANCELLOR was clear that if it should turn out that this purchase was made by the father's own, and not out of the trust money, that then the plaintiff, the heir at law, would be excluded; and he thought tho' the real estate descended was ever so inconsiderable, yet it would still exclude the heir at law.

The other way that this part of the case was viewed in, was, that supposing even this purchase was made with the trust money descended to the heir at law in satisfaction of part of the covenant, to realize the 6000l. &c. and would in the hands of the heir be subject to the trust of those articles; yet that this descent would be a customary bar to the heir, it is clear that it would bar at common law, for there it was a clear descent, and it cannot take any notice of the trust; and this court will not distinguish, but consider it as a descent and a bar.

The last point insisted on was that the heir at law is barred by the custom although no real estate descends to him, and it does not seem to be very unreasonable, because the legal presumption is, that a legal inheritance will pass from the father to his heir, and it is clear, that if only five shillings a year or less descended that would bar the heir, so that from that it appears the heir may be barred of his provision out of the personal estate without an equivalent from the real, for the personal estate may be 100,000l. and the inheritance not worth twenty

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 ERRINGTON
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twenty shillings, and to this purpose was cited *Swinb. part. 3, Sect. 16 No. 5*, where he says in relation to the province of *York*, that if the testator has a wife and no child, the wife shall have one moiety by the custom, and the husband may dispose of the other; or if he does not, it shall go according to the statute of distribution. So if the testator has a wife and child, which child is his heir at law, the personal estate shall go, as in the other case; and here he speaks not of any real estate descending to the heir at law, he speaks in the same general way, No: 6. He speaks in the same general in *Part 5. Sect. 18. No. 2.*

As to these two points, the CHANCELLOR delivered no opinion, but rather inclined to think that there must be a descent of a real estate to bar the heir; but he reserved the consideration of this till the master had taken his account of the personal estate, and when he had made his report, that then he would determine to whom and in what manner the surplus after the payment of debts, funeral, &c. should be distributed.

Quere, Whether the counsel and court have not mistaken the true point in the cause: For it seems clear that the son is barred of any customary share by taking by descent a reversion or remainder in fee of the 1000l. a year; for the last remainder in the settlement is to the right heir of the father, and this point seems to be settled, 2 *Vern. 375*, in the case of *Constable v. Constable*. There, upon the hearing of the cause, a question arising upon the custom of the province of *York*, touching the

the distribution of the personal estate of the father, an issue was directed to be tried at law, whether, the father having by settlement on his marriage limited his real estate to himself for life, remainder to his first and other sons in tail, remainder to his own right heirs, the eldest son was thereby excluded by the custom of the province of *Kork* from having any share of his father's personal estate, and being found that he was thereby debarred and excluded, upon the equity reserved, it was decreed accordingly.

1744.
ERRINGTON
against
WARR.

HOWES against WADHAM.

Feb. 20th.

THE defendant *Wadham* contracted for an equity of redemption, and paid part of the money down; the other part was to be paid to the mortgagees in discharge of their principal and interest: the mortgagees very fairly laid before the defendant's counsel all the title deeds, and the defendant ordered an assignment of the mortgagees to be drawn in trust for him; but his counsel discovered that the mortgagees had not the legal interest of the mortgage-term in them, but only the equitable interest; for they claimed under an assignment from a person who should have taken out letters of administration, but did not: the defendant upon this prevailed upon the party to take out administration, so got the legal interest of the mortgage-term to himself; and sets the mortgagees at defiance; whereupon they brought this bill, that the defendant might complete his purchase, and so redeem them, or be foreclosed; or else that the estate might

The mortgagor or his heir should be a party to a bill by mortgagee. Where a man enters into a treaty with a mortgagee for the purchase of his interest, but finding he has not the legal estate, procures it to be conveyed to himself without the privacy of the mortgagee, equity will consider such person as a trustee for the mortgagee.

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HOWES
against
WADHAM.

might be sold, and the plaintiffs paid in the first place: and besides this, they prayed general relief against the defendant *Wadham*.

This mortgage had been of very long standing, above thirty years, and the plaintiffs did not make the heir of the mortgagor, who was entitled to the equity of redemption, a party. And an objection was taken, that there was a defect of parties; the heir of the mortgagor ought necessarily to have been a party before the court; for it is impossible for the defendant to have a complete title 'till the heir at law is before the court, and decreed to execute proper conveyances, or foreclosed of his equity of redemption, and this court will not compel him to complete his contract without a full title.

That the defendant can neither redeem the plaintiffs, nor foreclose the mortgagor without having him before the court. As to what is said, that the heir of the mortgagor is barred by length of time, and so unnecessary to make him a party, that is a point which a purchaser cannot be supposed to know; and if the court was now to decree him to complete his purchase, the heir at law may come upon him and overturn his purchase, and perhaps prove that all the mortgage-money and interest is overpaid by the rents of the estate.

LORD CHANCELLOR. I think there is a defect of parties. As to every thing which is expressly prayed by the bill, and as to that particular which prays a sale of the mortgage-term, I never knew such a thing decreed without having the parties intitled to the

the reversion before the court ; because, till an actual foreclosure, it is *primâ facie* liable to redemption : and as to the length of time, the mortgagor is intitled to be heard, who may set up many defences to excuse from the lapse of time.

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HOWES
against
WADHAM.

As to the other relief prayed, that the defendant *Wadham* may redeem the plaintiffs, or be foreclosed, it is true, that a person who takes a subsequent security may be compelled to redeem the first ; but then the account must be intire, and the redemption intire and conclusive upon all parties, and all the securities brought before the court : And in the present case, the account could not be conclusive for want of the heir of the mortgagor before the court, who may traverse such account, and therefore the party who redeems may pay such a sum to redeem the term, which when examined into, there may not be so much money due as against the heir, and the Court will not lead a purchaser into a snare, and the Court will not do a vain thing, that is, decree an account between the parties which may be opened hereafter by other parties, for that would be endless ; and therefore the Court will not make a decree, till it can make a complete one.

But there is a relief which the plaintiffs will be intitled to under their *general* prayer, without any necessity of making the heir at law a party, and that is to have *Wadham* considered as a trustee for the plaintiffs as to the legal estate of the term, from the nature of his procuring it, at a time of treaty with, and acknowledgment of the plaintiff's mortgage, and pay them off ; if those things appear in evidence

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evidence which are opened, I shall make no great doubt to have him considered as a trustee for the plaintiffs as to their principal, interest, and costs, and to have the residue of the term as a security for himself, for such money as he himself has advanced.

SNELGRAVE *against* BAYLY.

A bond, though it be only a *chose in action*, is a good subject of a *donatio mortis causa*.
Prec. Chan. 300.
2 Eq. Abr. 573.
1 Wms. 404, 441.
3 Wms. 356.
3 Atk. 214.
2 Vef. 431.
2 Bro. Cha. 612.
1 Vef. jun. 546.

Mr. Attorney General, Ryder. The question in this case is, Whether a bond or other *chose in action* may be granted by way of *donatio mortis causa*? Your Lordship directed us to search for precedents; we have discovered two, which we submit to your Lordship as in point, that a *chose in action* may be so given; the first is the case of *Lawson v. Lawson*, in 1 Wms. 441, 442. There a question was whether a note drawn by a husband on his goldsmith to pay 100l. to his wife for mourning, was a good *donatio causa mortis*, the husband dying of the same sickness in which he made the gift? There were two objections to the wife's taking the 100l.; the one was, that she could not take it by way of gift, because a gift from a husband to his wife is in law a gift to himself; the other, that supposing this bill operated as an authority for the goldsmith to pay the 100l. to the wife, yet that authority determined by the husband's death: And yet notwithstanding, it was decreed to be a *donatio mortis causa*. This case answers the difficulty in the present, that although the giving the bond to the defendant could not pass the legal interest to her, yet it amounts to a direction to his executors, that the bond

bond should be appropriated to the donee's use, and make the executors, who have the legal interest in the bond, trustees for her; and bonds and other *choses in action* are now currently assigned, and yet nothing passes at law by such assignment but the paper and wax, for such assignee cannot recover in his own name, but must use the name of his assignor; and in *Swinburne* it is said, That if the assignor die, the assignee may take out administration to him *quoad* such bond, and then may sue in his own name as administrator.

1734.
SWEETGRAVE
against
BAYLE.

The other case is in *Chancery Precedents*, 309. *Jones and Selby*. That was a dispute about a *donatio mortis causa* of a government tally, which is a *chese in action*: in that case, it is all along admitted, that it was no improper subject of a *donatio causa mortis*: But as there was not sufficient proof of the gift it was decreed against the donee.

LORD CHANCELLOR. I had some doubt whether there could be a *donatio mortis causa* of a bond or other *chese in action*, because a bond considered at law as a thing in possession, is no more than the wax and paper, and no more can pass at law by the gift of such bond; but the beneficial property or interest is the debt which at law still remains in the power of the donor, notwithstanding his gift of it to another: But equity has introduced great alteration in *choses in action*, and continually supports the assignments of them in such manner, that, if an obligee assigns a bond, and the obligor has notice of it; yet if he after such notice will pay the money to the obligee, though at law it is a good

1744.
 SHELGRAVE
 against
 BAYLY.

good payment, and the obligee can well release it, yet in equity the obligor shall be obliged to pay the money over again to the assignee; so, if a bond is lost at law, the debt is lost, because the obligee cannot sue at all; for though the loss of such bond may be given in evidence upon the trial well enough, yet the plaintiff will be wrecked before he has advanced to a trial: for upon his declaring, he must make a *profert* of the bond, and give *oyer* of it, which it is impossible for him to do, when his bond is lost (c). But in equity, though the bond is lost, yet the demand contained in it is not, for he may recover the money in this court; therefore I am now satisfied, that this is a good *donatio mortis causâ* of the bond, and it is the stronger by reason of the extent to which this court has gone in supporting assignments of *choses in action*:—the testator might have assigned this bond, and though he had done it voluntarily, this court would have maintained it against himself, or any person claiming under him; therefore this court supports equitable interests in the same manner as if they were in possession. The testator gave this bond to the defendant in his sickness, with all the circumstances and expressions to make it a valid gift, *mortis causâ*, here, says he, take this bond, it is yours; if I die, I give it to you, that you may have something after my death. This is read out of the donee's own answer, and is clear proof and stands uncontrovertible,

Suppose

(c) But it is since determined that a party may state in his pleading, circumstances to excuse his making *profert*, as that the deed was lost by *time and accident*. *Read v. Brookman*, 3 Term Rep. 171.

Suppose the testator in the present case had bought chattels and taken them in a bill of sale in a trustees name, so that he would have had only an equitable interest, the legal property being in the trustees; suppose the *cestui que trust* had had possession of the goods, and on his death-bed had delivered them over to the defendant in such manner as he has done the bond: this would have been a good *donatio causa mortis*, and yet there he had no more than an equitable interest, and no legal one; and such gift would bind the equitable interest as much as it would the legal property, if the party had had it.

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SNEELGRAVE
against
BAYLY.

The two cases or authorities are strong as to this purpose, that in 1 *Wms.* 441. is in point: there the testator intended to give 100l. to his wife, and drew a note on his goldsmith for that sum, payable to his wife; the note vested in the husband, and was the same as if it had been to have been paid to the husband himself, and the demand upon the goldsmith was a *chose in action* in the husband himself; and yet a *donatio mortis causa* of such note was decreed to be valid; and that does not at all differ from the case of a bond.

The other case in *Chancery Precedents* 300; as to the opinion given at the rolls, is equally strong with the former. There the testator gave to A. a hair-trunk with all that was in it; there happened to be a tally on the government, inclosed for 500l. which was a *chose in action*. The trunk itself was no more than the *res continens* of no value; the master of the rolls decreed it as a *donatio mortis causa*; upon

1744.
 SNELGRAVE
 against
 BAYLY.

upon appeal, the Chancellor was of another opinion, but upon another foundation; not that the *donatio mortis causa* was not good, but that a subsequent will was a constructive satisfaction of it, and that both gifts should not stand. I don't say, that this was a direct opinion on this question; yet it does not contradict, I think, the present case, being like the cases of equitable assignments of *choses in action* it must stand (*d*).

Dismiss the bill without costs.

Feb. 20th.

MAYTIN against HOPER, DITCHFIELD, and
 CHAMPION.

An annuitant for life is not to abate in proportion with pecuniary legatees, upon a defect of assets.

ONE question in this cause was, Whether an annuitant of 100*l*. for her life, should abate in proportion with other pecuniary legatees, upon a defect of assets?

It

(*d*) *Bibby v. Coulter*, Exchequer in Ireland, 29th June, 1791.

George Coulter, on the 4th September 1787, being then extremely ill, got out of his bed, went to a chest, and took out three promissory notes, which he handed to the surgeon who attended him, and desired that if any thing happened to him—if he should die of that illness, under which he then suffered; that the surgeon should give the notes to *William Bibby* (the plaintiff) for his own use, and inform him, that he (*George Coulter*) desired he would allow his sister, *Abigail Foster*, 10*l* *per ann.* for her life out of said notes.—At the same time he took a casket containing seven or eight pocket pieces, which he also gave to the surgeon;—the owner of the house where *G. C.* lodged was present at this transaction, and had some wearing apparel, &c. given to him by *G. C.* who next morning desired him to recollect, that he had given the notes for *Bibby's* use, with a request that he would allow his sister 10*l*.

per

It was insisted the should abate; for the devise of an annuity out of a personal estate was no specific legacy, because it was not of any certain thing, but in nature of a general legacy, with this difference only, that a common legacy is to be paid but once, and an annuity is no more than a multiplication of a common legacy, it being to be repeated only as to its payments for so many years as it shall have continuance.

1744.

MARTIN
against
HOPPER.

Lord

per ann. during her life, declaring at the same time, that he had earned the money in Mr. *Bibb's* house, and that he was the proper person to have it. One of the notes was for 71*l.* another for 144*l.* and the third for 216*l.* 17*s.* 6*d.* they were indorsed in blank, and G. C. died in a very short time, and before any of the notes became payable.—The bill prayed to be decreed the possession of these notes which had got into the hands of the defendant, the personal representative.

Frankland and *Whitstone* for defendant, made three objections:—First, That the bequest in this case was not a fit subject for a *donatio mortis causa*, as being notes payable in future, with blank indorsements.—Secondly, Though they should be allowed to be a fit subject, yet being delivered to a third person, not given to the donee in the life-time of the donor, the gift must be void.—Thirdly, Although the gift and delivery should be allowed, yet here a condition (that is, the annuity) is annexed to the gift, and the residue of the property is disposed of.

Lord Chief Baron YELVERTON and Mr. Baron MESTRE overruled the two first objections, but held the donation to be void on account of the third:—Here an annuity was annexed to the bequest, and the rest of the property at the same time disposed of, which shewed strongly *animum testandi*, an attempt at a nuncupative will.—These gifts cannot be qualified; they must be absolute; the annuity is a thing incapable of delivery, and consequently incapable of

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against
HOPER.

LORD CHANCELLOR. The Court can't make a valuation here to put the annuitant and the general legatees upon an equality, without altering the nature of the annuity devised. Annuitants shall not abate in proportion with ordinary legatees; for annuities are specific legacies, and I believe there was

of being the subject of a *donatio mortis causâ*.—There was no possibility of separating the annuity from the notes; suppose the plaintiff was unwilling to receive the notes, conceiving them not equal to pay the annuity, has the annuitant any remedy?—Suppose they came to an innocent indorsee, could a court of equity attach them in his hands for the annuity?—The annuity here has been considered as a trust, which the court should support:—but the annuity was a trust upon a trust, which the court could not support, and for which the annuitant had no remedy.—Annexing a testamentary disposition to a *donatio mortis causâ*, would be to set up a nuncupative will without its solemnities, and consequently to render useless the statute of frauds, for if one bequest can be tacked to a *donatio mortis causâ*, so might a thousand, and thus a whole property be disposed of, without any solemnity or guard whatsoever.—Therefore, in every case, a *donatio mortis causâ* must be unfettered, and free from every condition.

Mr. Baron POWER was of opinion, that by the gift to the donee, the whole property vested absolutely in him on the death of the donor; that the bequest of the annuity, being incapable of delivery, was void; therefore it was totally null, and was not to be considered any more, than if it had never been mentioned by the donor:—the annuity could not, in contemplation of law, be considered as a charge or condition annexed to the gift;—but if it were, there was no authority to shew that a condition annexed to a *donatio mortis causâ*, makes it void, and therefore this gift was good as a *donatio mortis causâ*.

Mr. Baron HAMILTON, absent.

The bill was dismissed, but without costs, on account of the difference of opinion in the court. MSS. Cases.

was a case in the *Exchequer* where it was so determined.

1744.

MAYTIN
against
HOPER.

Mr. *Attorney General*. If an estate is devised in trust to be sold for payment of debts and legacies, the bond and simple contract creditors shall be paid in preference to the legatees, and though this might have been decreed otherwise formerly, yet it is now the established equity of this court, which will decree the testator to do as he ought to do, by being just, before he ventures to be bountiful: and as a former Chancellor said, a court of equity shall not decree a man to sin in his grave.

To which the Lord Chancellor HARDWICKE assented, and said it was now settled for debts to be paid before legacies, out of equitable assets, or where the fund was merely a trust.

In another part of the case, the CHANCELLOR said, that if a man is indebted by simple contract, and dies, if his executor give bond for it, that extinguishes the debt of the testator, as much as if the testator had given such bond in exchange himself, for the giving the bond by the executor is an admission of assets on his part, and an acceptance on the side of the creditors;—besides, interest is receivable on the bond, which quite alters the nature of the former debt; and such bond may be pleaded in bar to an action brought upon the simple contract; but if a man is indebted by simple contract to another person, and a stranger gives bond for that sum to the creditor, that will not discharge or extinguish the simple contract, although it might be given with such intent.

A bond given by an executor to a simple contract creditor of his testator, is an extinguishment of testator's debt.

1744.

CARTE
against
CARTE.

CARTE against CARTE.

March 11.

Under the circumstances of this case, a will in 1735, was held sufficient to pass the trust of a lease then in being, and the subsequent renewals in 1739.

The addition of a codicil to a will sets up every thing in the will, not altered by the codicil; and though the codicil is without date, yet if it appears by evidence to have been executed subsequent to an act which might amount to a revocation, it will operate as a republication.

If a man adds in his will that if his executor or legatee should

be attainted of felony or treason, another should take in his room, if the first be attainted before the death of the testator, the substitution is good.

3 Atk. 174. Ambl. 28. S. C.

THIS was a bill to have an assignment of rents and profits of a leasehold estate vested in the defendant, *Sarah Carte*, in trust for the plaintiff, Mr. *Carte*, the historian:—The case was this:—Plaintiff's father was one of the prebendaries of the cathedral church of *Litchfield*, and as such had a statute power of granting leases of his church lands for three lives or twenty-one years. Now in order to make a provision for his family he had annually, for a great number of years together, granted fresh leases to one of his children for twenty-one years, which child always surrendered the former leases, and at the same time declared that his name was only made use of in trust: The lease had been granted from 1715 to 1724, to *Samuel Carte*, the second son, but at that time the father taking some dislike to him, granted them to his daughter, *Sarah Carte*, in trust for his own benefit during his life, then to such person, or persons, as he should appoint by deed or will:—And for want of such, among his three children, the plaintiff and two defendants equally. This method of leasing and declaring the trust continued without variation until *August 1735*; but in *January 1735* the father makes his will and thereby appoints and ordains his eldest son *Thomas*, the plaintiff to be his sole executor, requiring

quising him to pay all his just debts, and bequeath-
ing to him all the rest and residue of his goods and
chattels and estate, real and personal, whether in
possession or reversion, excepting what he should
thereafter give and bequeath to any person or per-
sons, which gifts he would to be valid and effectual,
as if it had been mentioned before the general resi-
duary clause;—*Item.* He declared it to be his mind
and will, that his eldest son should have the dis-
posal of the lease of his prebend of *Tachbrook* made
to his daughter *Sarah*, and that he shall receive to
himself all the profits and advantages arising there-
from. He then gives money portions to his two
other children, to one 700*l.* to the other 80*l.*
Item. He gives to his son *Samuel*, his silver tankard,
and to his daughter, one half of his household
goods, and then goes on thus :

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against
CARTE.

“ Now whereas I have appointed my eldest son
“ *Thomas*, to be my sole executor, and bequeathed
“ to him all the residue of my estate after payment
“ of certain debts and legacies, I now declare that
“ if my son *Thomas* shall be hereafter molested and
“ prosecuted by the government, or any forfeiture
“ of goods or land ensue or happen, or he be ren-
“ dered incapable of being allowed to be my execu-
“ tor, or of taking or enjoying the premises afore-
“ said, then and in such case my mind and will is,
“ that my son *Samuel*, and daughter *Sarah*, shall be
“ my joint executors, and I give and bequeath to them
“ all that estate I designed for, and before bequeath-
“ ed to my son *Thomas*.”

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against
CARTE.

After this will the testator continued yearly to have the old lease surrendered, and a new one granted, and to have a declaration of trust in the form as he always had, before the making the will, however the last lease, and declaration of trust was granted on the 24th of *September 1739*:—A little before this time Mr. *Carte* had disgusted the ministry, and there was a very popular report that the government would prosecute him, whereupon he fled to *France*. The two other children at this juncture endeavoured to prevail upon their father to alter the dispositions he had made to his eldest son, and for this purpose, Mrs. *Palmer*, who was privately married to Mr. *Samuel Carte*, on *September 10th 1739*, a few days after her marriage, set out from *London*, and came down to *Leicester* where the testator lived, upon *September 22d 1739*, which was on a *Saturday*; she there applied herself to Alderman *Goodall* to communicate this to Mr. *Carte*, who did so, and had several conferences with him about it. At first Mr. *Carte* did not consent, but afterwards he was prevailed upon to receive a draught for that purpose from Mr. *Hill*, and the testator having left large blanks in his will to fill up occasionally, he now filled them with the alterations of his will upon account of his son's being in danger of a prosecution.

The last lease and declaration of trust was made on the *Monday, September 24th, 1739*, after Mrs. *Palmer's* coming down; so that there was little doubt from circumstances but that this additional clause was thrown in after the last new lease: For it was in almost the words of Mr. *Hill's* draught,
and

and all those conferences and preparations of the draught could not be presumed to be done in so short a time as between the *Saturday* and *Monday*.

1744.

CARTE
against
CARTE.

Mr. Attorney General. There are three questions: the first, Whether the devise of the trust of this lease is revoked by the subsequent renewals and declarations of trust?

The second, As the testator upon his last lease in 1739, has the trust declared to himself for life, and then in trust for such person as he shall appoint by will, whether the precedent will of 1735, is not a sufficient appointment within the meaning of the trust declared upon the last renewal in 1739?

The last, If the plaintiff should fail upon these two points, yet whether the clause added to the will subsequent to the last renewal will not amount to a republication of such will?

As to the first, If there is revocation it can be no more than a constructive one, in all which there must appear to be the *animus revocandi*, which there does not in the case;—For the design in these annual renewals was not to revoke his will, but to leave as large an interest in this lease, as he could at the time of his death. For by this method the lease could not run out above one year: and this practice was not taken up after making of his will; but the testator had observed the same uniform method of these renewals for twenty years before;
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for all the leases and declarations of trust are in the same form of expression; so that he was rather proceeding in his old way, than setting up any thing new to destroy or revoke his will.

It is insisted upon, that this will, with regard to this leasehold estate, is revoked by the subsequent renewals, and the declarations of trust upon these renewals, which are repugnant to the disposition by the will; and the reason they go upon is this, that the thing given by the will was not existing at the time of the testator's death, but was destroyed by the subsequent renewals; and indeed, it is true, that if a man is possessed of the legal estate of a term for years and devises it, and afterwards surrenders it, and takes a new term, that is a revocation of the will at law. So it would be in this court a revocation; for where this court has concurrent jurisdiction with the courts of law, it will decree in the same manner, for the sake of preserving an uniformity of justice: For it would be absurd that the *electio fori* should vary the right; but the present case is by no means within the reason of either of these cases: For this is a devise of a mere equitable interest, or the trust of a term, with which the courts of law cannot interfere; and is subject only to the jurisdiction of this court, which upon all such occasions favours the devise, and will not admit of a revocation upon construction, unless there appear from the nature of the act, the *animus revocandi*: so that if a man devises a real estate in fee, and afterwards mortgages it, either for years or in fee at law; as to the first case, it is

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a revocation for the mortgage term, and leaves only a reversion in the devisor : And in the latter, it is a total revocation : But as this court has the exclusive consuance of equities of redemption, so that there can be no confusion of justice, it departs from the construction of the common law, and suffers the subsequent mortgage to be only a revocation, for the money advanced upon such mortgage, and to shew that a court of equity requires the *animus revocandi* in destroying wills, he cited the case of *Onyons v. Tyrer*, 1 *Wms.* 343, where the tearing of the seals from a will, though it absolutely revoked and cancelled the will at law, yet a court of equity relieved, because it was done upon a mistake, and the party did not intend to revoke, or cancel such will ; but against such doctrine the case of *Cogshall v. Cogshall* at the *Cockpit* was cited, where a man devised an estate in fee, and afterwards suffered a common recovery, in order to confirm and establish his will, and declared his intention to be so in the deed to lead the uses : yet this was held to be a revocation of the will against the very intention of the testator. This was a mere legal construction, and as the courts of law had jurisdiction in it, this court will conform its sentence to those of the common law, for necessity, that there may not be a clashing of judgment, but in the present case the court of equity is loose and left at large to follow its own dictates.

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2 Vern. 741.
4 Bur. 2515.
Cowp. 49.

As to the second question, as the testator upon the last lease in 1739, has declared the trust to be to himself for life, and then in trust for such person
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or persons as he shall appoint by deed or will, whether the precedent will in 1735, is not a sufficient appointment within the meaning of the declaration of trust upon the last renewal in 1739.

To this two objections are made ; the one, that the declaration of the trust in 1739 has no relation to any will, but a future one, and therefore in trust only for such persons as should be nominated by some future appointment ; for the power of appointing is in the future tense, "*shall appoint*," and consequently, if the will of 1735 is no appointment, there is no appointment at all : So that the trust of the term shall be shared among the plaintiff and the two defendants equally.

The other objection is, that the deed of trust of 1739 relates only to the lease of 1739, is revoked and cannot be set up again by the deed of trust of 1739. As to this, that will is clearly within the meaning of the deed of trust of 1739. For tho' it is executed in 1735, yet it is not considered as his will until his death. This will in 1735 is no more than a continuation or succession of new wills from time to time, down to his own death ; and if the will continues, it is the same thing as if a new will was made every day, or every hour :—so that this, in fact, may be considered as a will made after the last deed of trust, and so fairly within the description of the words, "*shall appoint* :—" As to all devises of personal estates the will operates futurely, and has its efficacy from the testator's death. If a testator gives all the corn in his barn,
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the corn that is there at the hour of his death shall pass, although he had none there at the time of making his will:—If a testator gives all his leasehold estate, though he had none at the time of making his will, yet if he had any at the time of his death they shall pass, though he lived fifty years.

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LORD CHANCELLOR. Those cases are clearly so.

Mr. *Attorney General*. The case of a will of lands is different, for if a great estate is given, or all the rest and residue of a real estate, lands purchased afterwards, will not pass:—But this does not arise from the nature of a will; but on the contrary, from the expressions of the statute of wills, which says, “The deviser *having* lands, &c.” and in pleading the devisee must say, that the deviser *being seized* made his will. If a man surrenders copyhold lands to the use of his will generally, such copyhold will pass by a will executed either before or after such surrender.

LORD CHANCELLOR. No question but a will precedent to such surrender will pass the copyhold, if the surrender is general to the use of my last will: For that generality takes in all wills, whether executed before the surrender or after.

Mr. *Attorney General*. As to the third point, of republication, that will depend upon the additional clause inserted long after the time of executing the will. At first the question will be, as to the time when this insertion was made: If it was made
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after the last, no doubt but it will be a republication of the will in 1735, and operate as a new will by passing this leasehold estate : As to the time, the difficulty is, that the testator made this addition by himself without witness, and without date ; we have entered into strong proof that it was inserted after the lease, and the defendants themselves admit that it was inserted at some time subsequent to the original execution, and therefore the court will presume that it was done at a proper time to pass the lease, for this court will not presume a revocation.

LORD CHANCELLOR. This will appears upon the face of it to be all of the same date ; I do not know whether I am not bound by the *probate* to consider all the parts of the will to be of an equal date ; perhaps it may be necessary to send this to the spiritual court, in order to prove this addition separately as a codicil.

Mr. *Attorney General*. Your Lordship may enter into the time when this addition was made ; and it would be to no purpose to send it back to the spiritual courts ; for they cannot enquire into the times : indeed they may prove the addition as a codicil, but then they will prove it without a date, which can give the Court no more information than what appears upon the face of the probate already.—The spiritual courts can pronounce which was the last will, and what is a codicil to a last will, but when they have once established the will, or codicil, then the courts of law, or equity, have the

the construction of such wills in most cases, and the conformance of every circumstance belonging to such will, which is necessary to the proper construction of it; such circumstance is time in the present case: The ecclesiastical court has clearly nothing to do, in the present case, because the question is in regard to the trust of a term, which is appropriated to this jurisdiction, and which they have nothing to do with: so that they would have no jurisdiction to enquire about this circumstance of time, which this Court wants to be informed of, and therefore this Court must examine into it itself: the ecclesiastical courts seem to have a mixed, or double jurisdiction: the one, by which they undertake the probate of wills or codicils; the other, by which they determine questions upon the wills themselves, after they have proved them. As to the former part of their jurisdiction, I see but one case where they can examine into the circumstance of time, that is, when there are two wills offered to be proved, and each of them without date: there they must of necessity enquire into the time to distinguish which is the last will, of which they are to grant *probate*: As to the latter part of their jurisdiction, they may oftener have occasion to examine into time, for they may do so in all cases of ademption of legacies; because, as to them, they have a concurrent jurisdiction with this Court, and time is often a necessary circumstance to the ademption of legacies. This additional clause only disturbs the will upon one event, which as it has not happened, there can be no contests about it in the spiritual court.

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The present question arises upon the revocation or ademption of a legacy of the trust of a term; so that the Court may go into proof of external circumstances, in order to let in light upon the question: It is the constant practice of the Courts to do so, in all devises of specific legacies, the Court examines into time and other circumstances, which cannot appear from the will itself, and in such case it examines into the alteration of the state of such specific legacies, in order to determine whether the legatee is to have them, or not, and in this case it is of necessity that the Court must examine into the circumstance of time in order to determine the right: Suppose a will proved without a date, and a question arose in this Court concerning a specific legacy, or the ademption of legacies, the Court must examine into the time when the will was made, because it is necessary to try the question.

And this case differs from all those where this Court has ordered a further enquiry to be made in the spiritual court; in the case of the will of Lady *Pickering*, it was sent back to the spiritual court in order to be better informed about some rasures, which appeared both in the will and the *probate*, and whether particular legacies which appeared upon rasures, and quite suspicious, were to stand or to be struck out. As to the case, that was sent to the spiritual court in Lord *Macclesfield's* time; that was to know whether particular interlineations were made after the will, or before?

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Here the ecclesiastical court has found this clause to be part of the will, and I do not see any way that it can be propounded to that court for a security there: for it does not relate to an executor, or to such a legatee of a trust, which they have conuſance of.

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LORD CHANCELLOR. The method of propounding it to the ecclesiastical court would be, Whether this clause was not added at another time? and so to proceed as a codicil generally: for to be sure as this case is, they could not put a date, they wanting conuſance over the thing; therefore it will be needless to send it there, for whether this be considered as a part of the will added at a subsequent time, or a codicil made at a subsequent time, it will be of the same effect to the parties.

The general question will be, Whether the benefit of the new lease in 1739, passes to the plaintiff, *Thomas Carte*, by the will of his father in 1735, either by the original part of it, or the subsequent additions made to it?

And that general question will depend upon these considerations: The first, Whether the will of the 19th *January* 1735, was sufficient to pass not only the trust of the lease in being at that time, but also the benefit of the subsequent renewals, in case there had been no declaration upon the subsequent renewals?

The second, Whether the new declarations of trust made upon the last renewals, will make any alteration

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alteration in this case, by reason of the particular penning of them? And whether they will amount to a revocation of the will in 1735?

The third, That supposing there was a revocation of the will, either by the future renewals and determination of the legal interest of the old lease, or upon the new declarations of trust upon such leases, yet whether here is not sufficient evidence of a republication of the will of 1735 after the last renewal and the last declaration of trust?

As to the first, Whether the will passed not only the trust of the then existing lease, but also the benefit of all future renewals, in case there had been no declaration of trust upon such subsequent renewals? I am very clear of opinion that such will passed them under the circumstances of this case; the cases cited of revocation of devises of terms for years by surrenders, and taking a new term, are all of them of devises of legal estates of terms for years. The case in *Goldsb.* and that of *Abney* and *Miller* before me, were both devises of legal estates of terms then existing, and the penning of the will in the latter case was very particular and strong, to confine it to the then existing lease; for he "gave and devised all his leases, which he held of such a college," which is very restrictive; after the will he renewed these leases, and the law is so clear that it is a revocation, that it cannot be now disputed.

The devise of the chattel leases differs from that of real estates in fee: for a man cannot pass by any words in his will after purchased lands, and this was

was settled in the case of *Bunter and Cooke*, because the statute disables him from devising any real estate, but such as he is seised of at the time of making such devise: For it says, that a man *having lands* may devise them, &c. but if he has them not, the statute does not impower him to pass them by will and at common law he was quite disabled, and all this was settled in the above case, which was first in the *Common Pleas*, then in the *King's Bench* and affirmed in the House of Lords, where it was said with great reason, That there was no ground to carry the power of devising further than the expression of the statute; because if the after-purchased lands should pass it would be inconvenient, and the devisor ought rather to have an opportunity of re-considering his will, and if he thought proper to pass such after-bought lands, he might do it by a new will; but as to terms for years, they were deviseable at law, and a man may by his will devise leases for years, which he had not at the time of his devise.

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225.  
1 Salk. 237.  
11 Mod.  
106, 121.  
Holt 236.  
243, 246,  
348, 746.  
2 Eq. Abr.  
295. c. 1.  
1 Bro. P.  
C. 199.  
1 Fonbl. Eq.  
207.

If a man devises all his personal estate, or all the rest and residue of his personal estate, leases for years procured afterwards will pass: and if a man can pass such leases by general words, he surely can by a particular bequest: and therefore all these cases of the revocation of devises of terms for years, by surrendering the old term, and taking the new one after the making the will, arise from the short penning of the will, and not from any incapacity in the testator to devise a renewal of leases after the execution of the will; and therefore in the case of *Abney and Miller*, and the other cases, if the testator

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tor had said, " I devise such lease, and all renewals  
" upon it, and all such interest as I have in such  
" leases at the time of my death,"—no doubt but  
such new leases would then have passed.

The question in the present case then is, Whether, in this devise of the trust of a term, there are not sufficient words to pass this renewal in 1738? The testator had nothing in this lease but the trust, the legal estate is in his daughter; the devise of the trust of this term is very extensive, for it is, That the plaintiff shall have the disposal of it, and that he shall receive to himself all the profits and advantages arising therefrom; I think the way of construing this for the plaintiff is right,—To take this in the same manner as if the testator had done it in a large and extensive manner:—Suppose he had recited the lease, and declaration of trust, and had then given the trust to his son; that would have given him the whole trust, not only the existing term, but also the trust, and benefit of all the renewals of the declarations of trust, extends to take those in. It recites the lease to his daughter, and therein she declares, that the lease was made in trust for the father, during his life, after his decease, to such persons as he shall by will appoint; and for want of appointment, to his three children equally; and upon further trust, that the daughter shall from time to time permit and suffer the father to receive the rents and profits; and to the further intent that the daughter shall from time to time lease, assign, or surrender the demised premises as the father, during his life, or the person intitled to the trust after his death, shall direct or appoint;  
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so that this is not a trust only for the receipt of the profits, but also to leave, assign or surrender the same in regard to renewals as the father in his life or appointee after his death shall direct.

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If the testator had recited the lease in this will and the declaration of trust, and then had given it, no doubt, but that would have given the benefit, not only of that lease, but of all the renewals;— and the same thing, if a man possessed of the trust of a term for years, and had given the present lease and all future interest in the same land, this would have passed all future renewals: Suppose instead of this declaration of trust being made for the father for life, and then for such persons as he should appoint by his last will, it had been for particular persons, and then the same clauses had followed and the leases had been renewed from time to time, in such case there could not be a doubt, but the trust of the renewed lease would have gone to the person named in the declaration of trust.

Suppose it had been for the benefit of such persons as the father should by deed, or writing appoint, and in his life time he had made a declaration of trust for certain persons distinct from these declarations of trust, which accompanied each renewal, and then the lease had been renewed, the renewal would have been for the benefit of the *cestui que trust*, tho' appointed before the new lease, and notwithstanding the subsequent declaration of trust, and the word *advantages*, whether used so in the intention of the testator, yet is sufficient to take in

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all the renewals, and it will not only take in the receipt of the rents, but also the renewals.

But the acts of Mr. *Carte* from the renewals of new declarations of trust, which were occasioned by this abundant caution have introduced the grand perplexity in this case, for if it had rested upon the will, and the subsequent renewals only, there would have been no doubt:—but as the subsequent declarations of trust are laid before me, they lead on to my second point, and it would be a very unhappy case, if these acts which were done by the testator in order to carry on the same intention and to preserve the estate in the same manner to his son, should revoke that very will: But if they have done so, this court cannot say to the contrary.

As to this point, I have more doubt, because the father might have declared this trust by deed executed, and made it irrevocable. For though the power of appointment is “by any writing or writings,” which would have enabled him to have ingrafted a power of revocation, yet if he had made such appointment without an insertion of an express power of revocation it would have been out of his power to have revoked it, and the subsequent leases would have been subject to the trust of such appointment. But this power of appointment is not executed in that way, but by a will, which is in its very constitution revocable in its nature, without annexing to it any express power of revocation.

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The question between the counsel at the bar amounts to this, Whether these words " My last will or testament," shall refer to the act or time of executing such will, or to its legal operation, which was not till after the death of the father? If it refers to the time of execution, the plaintiff must fail of success, because the subsequent declarations of trust will revoke such will: but if it refers to the legal operation of the will, the plaintiff must have a decree: because then such appointment will be subsequent to all the deeds of trust, and will be considered as an appointment upon the last deed of trust, and so the appointment of the testator by the last act of his life: but I cannot find any case where such a construction has been put to to make a will refer only to the time of the death: It may be a reasonable construction indeed, and I should be sorry to decree against the plaintiff upon that head. This might affect copyholds, for where there is a surrender to the use of a man's will, I have never known any inquiry whether the will was executed antecedent to the surrender, or after; there is much reason in the arguments, the words " as the party shall by last will appoint," and to be sure the effectual appointment upon such will is as to its operation, but I can find no determination to it.

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However, I am of opinion for the plaintiff on the last question, which is the republication, for whether a revocation of the will should arise from the renewals, or by new declaration of trust; yet if there has been a republication, that takes away the revocation, and sets up the will.

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There was one thing which was mentioned, that this Court must go by the same rules as to revocations of wills, as Courts of law do, and that, to be sure, is true, where it is compelled to do so, in order, as Mr. *Attorney General* has said to preserve a sameness of justice in both jurisdictions: but this is only a concurrence of jurisdictions; this Court has relieved against revocation, upon the head of accident, where the law would have held it a clear revocation: it is urged, that equity follows the law, or else it would occasion a confusion in the laws of property: That rule is not universal, but relates only to the laws of descents, or successions to property, or to the limitations of it, in all which, this Court and the Courts of law agree in construction.

But the present case does not relate to that, but to the instrument or conveyance by which property is to pass; and no doubt but there are many acts which will pass a trust, which will not convey a legal interest: A declaration under hand, will pass the trust of a fee-simple; in which case the law would require a solemn deed: But where this Court is not compelled by a concurrence of jurisdiction to decree that to be a revocation which the common law judges to be so, there it departs from the rules of law, as in the case of mortgages: But supposing there was such revocation as is insisted upon, yet I am fully satisfied from the evidence, that there was a proper or sufficient republication.

And as to sending the matter for a scrutiny into the ecclesiastical court, to know whether the additional

tional clause was inserted after the last lease and declaration of trust, there is no necessity for that, because the question comes only upon the rebuttal of an equity.

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As to the ademption of a legacy, this Court must judge of that, and therefore if I should send it to the ecclesiastical court to examine the probate, yet it cannot add to the instrument, and if without a date, they must prove it without a date. It might be regular to prove this clause as a codicil, but without a date, and then it would come to this Court to consider what was the time of making such codicil, which must depend upon such evidence as the Court has now before it: so that neither of the parties would gain greater light by sending it to the spiritual courts.

The addition of any codicil to a will, supposes it to be in force, and must set up every thing in the will, that is not altered by the codicil; now this codicil declares what he had given to his eldest son by his will, should stand, but in case of one event, which has not happened, so that the legacy in the will is good. As to the nature of this codicil, my opinion is that if this accident had happened to the plaintiff before the death of his father, the codicil would have taken effect, and have been valid. For if a man makes an executor or a legatee, he may add a clause, That if his executor or legatee should be attainted of felony or treason, and in such event, he then appoints another executor or legatee in his room, if the first executor or legatee is attainted before the death of the testator, the substitution is good,

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good, because it happened before any interest or office vested in the executor or legatee, but otherwise it would have been, if the misfortune of attainder had happened after the testator's death: for suppose a man gives an estate to A. in fee, and adds a condition that if A. commit high-treason, and is attainted, that he or his heirs may re-enter, that he then gives the estate over to a third person, that condition is void. The same of an estate tail with such condition; for if such conditions were to prevail, it would be abrogating the law of forfeitures, or at least setting up a new jurisdiction or seignior to take advantage of them, and would be delivering families from losing that which they have fairly forfeited by their crimes: Besides, in those two cases an interest actually passed, but in the present case, there may be a substitution of an executor or legatee, before the death of the testator.

The plaintiff must have the benefit of the whole trust of this term, and let the trustee convey, &c.

PERCY WYNDHAM O'BRIEN *against* LORD INCHQUIN, Lord CLARE, and others.

The testator charged his real estate with the payment of his debts, yet the personal estate decreed to be first applied. Ambl. 33. 1 Will 82. S. C. 1 Bro. Cha. 458.

HENRY, late Earl of *Thomond*, in the kingdom of *Ireland*, and Viscount *Tadcaster* in *Great Britain*, being seised of a fee simple estate of 9000l. year, and a personal estate of about 45,000l. and indebted to the amount of 60,000l. and upwards, made his will on the 14th *October* 1738, and thereby willed and devised that all his debts which he owed at his death should be justly paid: And devised all his estate

estate to the defendants, Lord *Inchiquin*, and Mr. *French*, in fee, upon trust within a convenient time after the Earl's decease, to make one or more sale or sales of a competent part of his estate for the best price, and with the money arising therefrom, and by the yearly rents and profits in the mean time; first to pay and discharge all the Earl's debts and pecuniary legacies thereby given, and such other legacies as he should thereafter give by any codicil; and in the next place out of the money to arise from such sale, and out of the rents and profits of the estate till such sale, to reimburse themselves all such costs and charges as they should be put to in or about the execution of such trust; And upon further trust, after payment of the debts, legacies, and charges of the trust, to convey so much and as to such part of the estate as remained unsold, to the use of the Honourable *Morrough O'Brien*, Esq. commonly called Lord *O'Brien*, son and heir apparent of the Earl of *Inchiquin*, for life, without waste: Remainder to his first and other sons in tail: Remainder to the plaintiff, the younger son of the late Sir *William Wyndham*, for life, *sans waste*: Remainder to his right heirs for ever. But the plaintiff was to take the name of *Brien* to continue down his family: By this will there was a power given to *Morrough O'Brien* and the plaintiff respectively to make a jointure of a competent part of the estate: The Earl then gives a legacy of 20,000*l.* to Sir *William Wyndham*, and by a codicil attested by only two witnesses, declares it to be in trust for his kinsman, *Charles O'Brien*, commonly called Lord Viscount *Clare*. The Earl then closes his will by declaring it to be his express meaning, that the whole money

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to be raised by such sales should be deemed and taken to be part of his personal estate, and gave and devised all the rest and residue of his personal estate of what nature or kind soever, and wheresoever, remaining after payment of his debts, funeral expences, and legacies, unto the said *Morrrough O'Brien*, and made his *William Wyndham* and Mr. *French* executors of his will, in trust for *Morrrough O'Brien*.

*Morrrough O'Brien* died in some little time after the testator, and the defendant, his father, claims as administrator to him, and this bill is brought by the plaintiff, an infant, by the Duke of *Somerset*, as his grandfather, and next friend, to have an execution of the trust in the will, and that such parts only of the estate may be sold as may be sufficient to answer the trusts, and be most convenient for the plaintiff, and that the Earl's personal estate may be first applied to pay his debts, funeral expences, and legacies. That the plaintiff's right may be established, and proper persons appointed receivers.

The Earl of *Inchiquin*, as administrator to his son *Morrrough*, has brought his cross-bill to have an account of the personal estate of the Earl of *Thomond*, that the debts, legacies, and funeral expences may be paid out of the real estate, and if any of them have been paid out of the personal estate, which was originally in its nature such, that Lord *Inchiquin* may have an allowance for the same out of the real estate, or the money to be raised thereon, and that a sufficient part may be sold for such purpose, and that

that the plaintiff may be paid, and receive the whole of the personal estate exempt from debts, legacies, or the residue thereof after such addition thereto.

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This cause was argued two or three days; and on the 7th February the LORD CHANCELLOR delivered his opinion as follows.

Some of the counsel have made the question to be whether the late Earl of Thomond has by his will given the residue of his personal estate, or all that part of his estate which is strictly called personal estate, or chattels to Lord O'Brien, son to the plaintiff in the cross-cause exempt from his debts and legacies; other counsel have made the question to be whether the testator has by will directed so much money in all events to be raised off the real estate by sale, or receipt of the rents and profits, and then to be added to, and made part of his personal estate, so as by a kind of transmutation of the thing to become personal estate, and then has given to Lord O'Brien just as much as the amount of what was the personal estate, strictly so called.

The question has been differently stated, yet it is the same thing in fact; a distinction without a difference; a distinction in terms only, and not in substance: For throw it into figures and you will see both questions come into the same thing:—Suppose a man has distinct sums of money 1000l. and 500l. and gives to B. 500l. expressly; suppose you add the sums together, they then make one sum of 1500l. Suppose he then deducts 1000l. out of it, and



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and gives the remainder of his personal estate to B. he will have just the same legacy he had in the former case, viz. just 500l.

As to the intention of the testator there are several objections to adding the two funds together; the real question is no more than this, whether Lord *Thomond* has given that which is strictly his personal estate, or what the law calls his chattels, or the just value of them, to Lord *O'Brien* discharged from debts and legacies, which by the will are thrown upon the real estate? This question will depend, in the first place, upon the rules established in a court of equity, upon the penning and construction of Lord *Thomond's* will, and application of those rules and precedents to that will.

Personal  
 estate the 1st  
 fund for pay-  
 ment of  
 debts.

With regard to the rules in equity, they are in general very plain: The personal estate in law, as well as equity is the first and original fund for payment of debts: As to legacies, the personal estate, is, both in the spiritual court, and this court, the only original fund for payment of them:—But if the personal estate be expressly exempted or privileged from the payment of debts, or legacies, or by a plain necessary implication or intention arising from the will, it is the same thing: for in either case it shall be exempted and go to the legatee without the load of debts or legacies upon it; or if such debts and legacies have been paid out of it, the legatee of it shall come upon the real estate for so much:—But if the personal estate is not favoured by the testator with such an exemption, either by express words, or a necessary implication or intention;

tion; then, in order to raise a constructive exemption, it must be that the personal estate was given as a specific bequest in some shape or other: and in relation to that, it must be taken along with it, that the testator must have appointed some other bank, or fund, for the payment of debts and legacies; not that he can in any degree impeach or lessen the right, that the creditors have upon such personal estate: yet as he was master of both estates real or personal, he may substitute a different fund for the payment of his creditors than what the law would do, as between representatives from him, whether they are heir or executor, or legatee of the personal and devisee of the real estate: But as to the creditors he cannot alter their claim to the personal estate; for although he has opened a further fund for them upon his land, yet they may still have recourse to the personalty.

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Having said thus much of the general rules relating to the exemption of personal estates, and turning the debts upon the real, I will only add, that there is no substantial or general difference between the case, where a man, in order to exempt his personal estate, or to substitute another fund for payment of his debts upon his real estate, whether he has done it in this manner, *viz.* that his real estate shall be charged or chargeable with his debts and legacies; or where, he has ordered his real estate to be sold for payment of them; for there are many cases where a testator, having directed his real estate, or part of it, to be sold for payment of his debts and legacies, that this court has taken the personal estate to be exempt from the debts  
and

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and legacies ; and many cases where the real estate has been charged or chargeable with them, and yet upon the whole the personal estate has been held to be exempt.

I shall now take notice of the cases which have been in this court on both sides the question. The first case is *Walter v. Pink*, in *Chan.* thirty-first July 1736, there Lord *Abergavenny* by will devised in the following words " All my goods, chattels, and personal estate, my debts, legacies, and funeral expences being first paid, I give to my son *George Nevill*," and makes four executors in trust for him till twenty-one, and then makes him executor : and then devises to his executors his manor of *S.* for 99 years, upon trust, by rents and profits, or by sale, and mortgage of all or any part of it, or by sale of timber, to raise money for the maintenance of his son, and 4000*l.* for his daughter *Jane Nevill*, at twenty-one, or marriage ; and then the term to cease, and what money shall after those purposes remain in the hands of his executor, he gives to his son, and directs that if his daughter *Jane* shall die before twenty-one, or marriage, the 4000*l.* or so much as shall be raised shall be paid to him in reversion or remainder. And by the latter part of his will he appoints that for the better raising the portion, his executors may receive part of the rents due to him at the time of his death, and make use of such part of the personal estate for that purpose as they shall think fit ; and the question before the master of the rolls was, whether this portion of 4000*l.* should be raised out of the real or personal estate ? And decreed that the personal estate should not

not be applied but be exempted, because it was a gift out of, and chargeable upon the real estate; and Lord *Talbot*, upon appeal to him, was of the same opinion: No doubt but debts, legacies, and funeral expences were in that case charges upon the personal estate, and ought to be paid out of it; but that was not the question there, but, whether the personal estate was liable to a particular sum of money, which was no legacy at all, and did not charge the personal estate, but was given as a particular charge upon the real estate: For the testator directs his executor to whom he devises his manor of S. by sale or mortgage of such manor, or by selling of timber upon it, to raise the portion. This could not be sued for as a legacy in the ecclesiastical courts, or if it had, a prohibition would have gone, for it is no legacy, but a particular sum of money charged upon the real estate and no gift, but by that charge, and the court took it that the power given to executors to apply such part of the personal estate as they should think fit towards the raising of such portion, was a farther proof that the 4000l. was primarily no more than a charge upon the real estate, and that the power to apply part of the personal estate was only superadding, by the testator, a power which the law would not have given them; for the testator would never have given them a particular or discretionary power over the personal estate, if the law without it had given them a general power over it to apply it to the payment of the portion of 4000l.

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The next case is that of *Chester v. Painter*, 2 Eq. abr. 375. c. 24.  
2 Wms. 335. which was before the king and privy council 313. c. 21.—  
560. c. 6.

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council upon a petition of appeal from the plantations, which is of great authority from the presence of Lord Chief Justice EYRE, and other great lawyers, who assisted the determination; but I think that case not at all applicable to the present; for there a man gave by will two thirds of his real and personal estate, particularly with debts and legacies to his children, and the other third of all his real and personal estate to his wife, chargeable also with debts and legacies: The question there was not as to any exemption of the personal estate, but as to the proportions given to the children.

2 Eq. abr.  
 370. c. 10.

As to the case of *Bamfield v. Wyndham*, in *Chan. Preced.* 101. There the testator devised all his real estate to trustees in fee immediately out of the rents and profits, or by sale, or mortgage of all the estate, or any part, to raise money for payment of his debts with interest and charges of the trust, and the surplus of the land, or money, he gave to his sister, and gave all his personal estate to his wife whom he made executrix. The question was, whether the wife should have the personal estate exempt from debts? Or whether it should not be first applied in payment of them? And it was urged, that the devise being to her, who was executrix, she shall take it, only as executrix, and so liable to the debts. But the Chancellor took notice that the debts exceeded the personal estate, and therefore he must mean, that she should have it exempt from debts, or he must mean nothing; and that there was no room to make a different construction:—But that case is not applicable to the present:—For  
 though

though the debts in this case exceed the personal estate, yet the testator has only given the residue of his personal estate, which is, if any should remain: and has only directed a competent part of the real estate to be sold; whereas in the case of *Bamfield v. Wyndham*, the testator gives the whole personal estate as specific legacy, and directs a sale of all the real estate.

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The next case is that of *Wainwright v. Benlows*, 2 Eq. abr. *Preced. in Chan.* 451. and 2 *Vern.* 718. In that case, the testator gives a real estate to trustees in fee, to sell totally, and out of the money to pay his debts; and then gives the surplus money to particular persons: as to his personal estate, he gives out of it certain specific things, and gives the residue of his goods, chattels, and stock to his sister, and makes her executrix, and the court decreed, that the residue of the personal estate was to be considered as a specific legacy, and so exempt from the debts. The reasons were these; the first, that the real estate was directed to be sold out and out, and he had parted with them for ever; so that he never intended any of it to remain in his family, nor go to his heir, but had given it away to other persons; and that land so directed to be sold, was to be considered as money:—But in the case at bar, Lord *Thomond* has only directed a competent part of his real estate to be sold, and the rest to be settled as lands, which very materially distinguishes the two cases: The other reason is a very strong one, and that is, that the testator in the latter part of his will gives several specific parts of his personal estate to his legatee, and then the residue of all his goods,

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goods, chattels, and stock to his sister, which was not a devise of a general residue; but of a special or specific residue, viz. not a general residue which should remain after payment of debts and legacies, but what should remain after particular specific things taken out of it: and therefore the intention of the testator was to protect this residue from debts, as it was devised away specially: and as he had elsewhere appointed a fund for payment of those debts;—there is some difference in the reason given in the two books. Mr. Vernon throws a further reason in his report, than what are mentioned; for he makes the Chancellor say, “that the debts being great, the devise of the residue of the personal estate would come to nothing, if it was not to be exempt from debts, which is the worst construction than can be made of a will.” I am not satisfied with that reason, if thereby is meant a general residue: For if it was to be admitted in bequests of general residues of personal estate by wills, it would make the constructions of wills to be the most uncertain and dangerous thing in the world: For clauses of *residuum*s are thrown in of course, when the testator does not know that he will have a farthing of a *residuum*; and it would be more dangerous to admit of that reason in the construction of residues given by wills in order to exempt them from debts, than the danger of letting the residues coming out be small or nothing: For residuary clauses are usually let into wills as of course without knowing whether any thing will come out or not. And in the case of *Barisfield v. Wyndham* above, the testator gave the whole personal estate to his wife and not as a residue.

The

The next case cited is, that of *Barkham v. Red-lam Hospital*, or the *Attorney General* against *Barkham*, where the testator devised in the following words, "For the just and true performance of this my last will, and for the payment of all my debts, I give and devise all my real estate to trustees and their heirs, and as to the personal estate which I shall be possessed of, and intitled to at the time of my death. I give the same to my executors to defray my funeral charges and other expences; and if my personal estate shall fall short to pay the same, the remainder to be paid by my executors out of the first rents and profits of my real estate, as they shall become due after my decease, until payment be made of my debts, legacies, and funeral expences as aforesaid; and if there be any surplus of my personal estate, that then my executors pay the same to my loving wife."—And decreed, that the widow should have the personal estate only chargeable with the funeral expences, and exempt from the payment of the debts or legacies: For he has given his personal estate, as such, and not a residue, to his executors to defray his funeral charges and other expences, which means the administration of the personal estate, and therefore gives it to his wife, after a particular thing taken out, for the debts and legacies had a new and distinct fund allotted for them out of the real estate.

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Forr. 206.  
207. 210.  
S. C. cited.

The next case is that of *Stapleton v. Calvill*, 10th July 1736, that case depended upon a very particular manner of penning that will, and according to the report of that case Lord Talbot delivers his

Forres. 202.  
203. 204.  
3 Eq. abr.  
372. c. 21.

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opinion with diffidence; but what he rests on is, that the personal estate was given to the wife, as such, and not by way of residue, that the testator had devised his real estate chargeable with the annuities, and in the same clause had made it subject to his debts and legacies, which annuities, as they were not charged upon the personal estate in their nature, but were made so on the real, and that the debts and legacies were charged on the real estate also by the same clause: and therefore there arose a natural and proper implication to give the personal estate to the wife exempt from the debts and legacies as well as the annuities.

These were the several principal cases which have been cited for Lord *Inchquin*, and they all depend upon their particular pennings, and are not applicable to the present case, except the reasoning of Lord *Cowper*, in the case of *Wainwright v. Benlowes* in 2 *Vern* 718. That in that case, the debts being great, if the devise of the residue was not to be exempt from debts, the legatee would have nothing which is at law deemed the worst construction which can be made of a will.

On the side of the plaintiffs was cited *Bramhall v. Wilbraham*, heard before Lord *Talbot*, on October 7, 1734, being *Michaelmas* Term, 7 *Geo.* 2. reported in cases *Temp.* Lord *Talbot* 274. *Wilbraham* being seised of a real and possessed of a personal estate by will gives all his personal estate whatsoever to his three sisters, equally to be divided among them; and his real estate to his four sons, chargeable with the payment of his just debts; the testator died indebted by

2 Eq. abr.  
 372. c. 18.

by simple contract, bond, and mortgages: The master of the rolls decreed that the personal estate should be first applied towards payment of all the debts, and that the real estate ought only to come in to supply the deficiency in case there should be any: The executrixes appeal from this decree, and Lord TALBOT took notice, that there was no clause to charge the real estate in all events, the word is, "chargeable:" That the natural construction of a will is, where the testator gives all his personal estate to one whom he makes executor is, that the personal estate must go to the creditors, and the gift must be intended after debts paid; and the testator has made his real estate subject in case there was a gift, not of the residue, but of the personal estate, and yet notwithstanding that, it was decreed, that the personal estate should be first applied for payment of debts, and should not be exempt. In the reasoning of this case, Lord TALBOT takes notice of the word, "*chargeable*," but if you look into his reasoning in the case of *Stapleton v. Colvill*, you will see the same great man with much judgment prove that there is no real difference between the words "charged" or "chargeable," or "to be sold," &c.

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The next case is that of *Harewood v. Child*, but the true name of it is *Hastlewood v. Child*, I have a copy of the decree, and it was heard before Lord TALBOT on the 17th August 1734. There the testator devised all his manors, land, and tenements, to trustees and their heirs, by sale or mortgage to raise so much as he should owe at his death with interest, and to reimburse themselves for the ex-

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pences

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against  
Lord  
Talbot.

pences of the trust, and to apply the money in such a course of precedence, as they should think fit: and upon further trust to stand seized of the premises to fold to such uses as his manor of M. was settled; and if any money remained of the sale, he gave that to such person as would be intitled to the manor, and then he gives all his personal estate of what nature or quality soever to his daughter, and makes her executrix, and upon hearing this cause, Lord TALBOT was of opinion, notwithstanding this express bequest of the personal estate, and not as a residue, that it should be applied to pay the debts in the first place, and that the real estate should only come in as an auxiliary fund. In this case all the things concur which are argued upon the present contest: For here is a direction not to charge, or to make the real estate chargeable with the debts; but to devise to trustees to raise by sale or mortgage so much as will discharge all the testator's debts, which should be due at his death, there is not a syllable taking notice of the personal estate to charge it with debts; for he does not say, that they shall raise so much by sale as with the personal estate shall pay his debts, or so much as his personal estate shall fall short of paying them; and what is stronger, he afterwards makes distinct devises of his personal estate to his daughter, and yet the personal estate according to the nature of the thing, and the rules of this court, and the natural charge which lies upon personal estate for payment of debts, &c. was decreed to be chargeable, in the first place with the payment of debts.

*These*

These were the principal cases cited on the one side or the other. I now come to the second point of the case, the particular penning and construction of Lord *Thomond's* will, and the application of the above cases to such will.—Lord *Thomond* has in the first place said, “As to my worldly estate, both real “and personal, I dispose thereof as follows; I will “and devise, that all the debts which I owe at my “death be justly paid.”—In this clause the testator seems to have had no design or intention to separate his personal estate from his real, or to make the latter only liable to the payment of his debts; because he has taken them both together: and in the first clause there is a sufficient implication to charge the real estate with debts, according to the case of Lord *Warrington and Lee*, and the creditors might have had the benefit of the real estate, &c.; there are no words there to exempt the personal estate; after this he gives the real estate to trustees in fee, by the rents and profits of his estate, and by one or more sale or sales of a competent part of the real estate, so that there was no direction to sell all the real estate out and out, and shall by and with the money arising from such sales, and by the rents and profits in the mean time, which was meant to accelerate the trust, pay all the debts which he should owe at his death, and all his legacies. Here it is insisted upon, That by this direction to pay all the debts and legacies with the rents and monies arising from the sale, it plainly appears that they were intended to be paid out of the real estate. But the case of *Hastewood and Child* directly over-rules this argument. Afterwards Lord *Thomond*, as to so much of the real estate as should remain unsold, has

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2 Kely 39.  
4 Bro. P. C.  
90.  
2 Eq. Abr.  
572. c. 19.  
2 Vef. 272.

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has given it to Lord *O'Brien* for life, remainder to his first and other son in tail, remainder to the plaintiff in like manner, upon his taking upon himself the surname of *O'Brien*, and continuing it in his family, which shews an intention to preserve as much of the estate as he could in the name: and then the Lord *Thomond* gives and devises all the rest and residue of his personal estate, of what nature or kind soever, or wheresoever remaining, after payment of his debts, legacies, and funeral expences, to Lord *O'Brien*, and makes Sir *William Wyndham* and Mr. *French* executors of his will. This is given to him as a residue, after payment of his debts and legacies, and this is the first case that the devise of a residue of a personal estate, after payment of debts and legacies, was ever attempted to be made exempt from debts and legacies, and there is no ground for such an attempt now: But in order to take off the force of these words, the counsel rely upon the preceding ones, "And my farther express will and meaning is, That the whole money to be raised by such sale of the real estate, shall be taken to be part of the personal estate." Upon this clause, it is insisted, That the testator has by these words made all the money arising from the sale, which is said must be equal to all the debts and legacies, to be added to his personal estate; and then he has given the residue of those compound funds to Lord *O'Brien*; but I see no foundation for such construction; and there is no case where a devise of all the residue of a personal estate, after payment of debts, legacies, and funeral expences, has passed such a compound fund. But such has only and always been taken to pass part

part of the proper personal estate : But it is insisted further for Lord *Inchiquin*, that the testator meant that clause in his will for the particular purpose of leaving Lord *O'Brien* this aggregate fund, or sum of money to what should be his personal estate at the time of his death, discharged of his debts. But I think that clause against Lord *O'Brien*; for nothing can be a stronger implication that the testator intended to make the compound fund liable to his debts, than his directing the sum of money which he had ordered to be raised out of his real estate to be added to his personal estate, which was the natural fund for payment of his debts ; and then has given the residue of that personal estate, after payment of his debts and legacies, to Lord *O'Brien*. There was an inference made from this clause by Mr. *Brown*, that Lord *Thomond* having directed part of the real estate to be sold for payment of his debts, and that all his debts should be paid out of it, and directed that to be part of his personal estate ; this money is thereby become part of his personal estate, and therefore not intitled to the privileges, which this court gives to real estates to exonerate them by applying the personal estate in case of them ; but here the estate remains as yet unsold, and the question before the Court is for directions how much ought to be sold ; and we are now to consider what privileges the real estate is to have before sale : the meaning of Lord *Thomond* is uncertain in adding this clause, and is rather to be guessed at than known. There never has been a case in this Court where a man has given not the personal estate, but only a residue of a personal estate, and that too expressly after payment of his debts and legacies,

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Malbiquin.

legacies, That such positive express words to charge it with debts, &c. have been over-ruled by any construction or implication whatever, and it would be dangerous to admit such uncertain constructions.

It is insinuated that Lord *Thomond* intended to keep his goods, plate, and pictures from being sold, and that they should go to Lord *O'Brien*, who was to be the first taker of the real estate;—if there were words in the will to that purpose, it might be material, but there is no such thing.

But the great argument of Lord *Malbiquin* is that which arises from the external circumstances appearing in this case: For it is proved in the case, that Lord *Thomond*, at the time of making his will, had not a personal estate exceeding 8000l. and the plaintiff admits, that it was not above 15000l.; his real estate was about 9000l. a year, and that his debts exceeded 60,000l.; therefore, if the construction is to prevail, that the personal estate is to be applied to pay the debts, as far as it will go, and the real estate to make up the deficiency only, the residuary clause would be a vain thing, and Lord *O'Brien*, who was plainly intended to have something out of the personal estate, would not have a farthing: But I think it is a sufficient answer to that, That this is not a bequest of the personal estate intire, but of a residue only, and that expressly after payment of debts, funeral expences, and legacies; and there are many cases where the same consequence has happened, that the residue has not turned out to be a penny: But I think this sort of evidence to prove the circumstance of the personal estate,

estate, and the debts at the time of making the will, is never to be admitted; the evidence is not opposed in this case, but I think it is improper evidence; and as my Lord Chief Justice HOLT says, in the case of *Cole v. Rowlinson*, 1 *Salk.* 234, 235. "The intent of a testator will not do, unless there be sufficient words in the will to manifest such intent; neither is his intent to be collected from the circumstances of his estate, or matters collateral and foreign to the will, but from the words and tenor of the will itself: and if we once travel into the affairs of the testator, and leave the will, we shall not know his mind by his words, but by his circumstances; so that if you go to a lawyer, he will not know how to expound it."

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The circumstances of a testator are not admissible evidence to prove the intention of his will.

Lord Chief Justice HOLT spoke thus of real estates, and perhaps carried it too far: For a real estate is a certain fixed thing, and the state of it might be ascertained at the time of making the will; but a personal estate is different and uncertain, as being in its nature liable to changes and fluctuations; and therefore it is more perilous to let in evidence as to personal estates than real. A man who has a great or small personalty at the time of making his will, may have it altered before his death: nay, may have it in his prospect, that the personal estate may soon be increased or diminished. In the present case, at the time of making the will, Lord Thomond's personal estate by one account is 15,000l. by the other, only 8000l.; he lived about two years and an half after making his will, and by dropping of leases, with the fines for renewal, his personal estate was increased to 35,000l. can it be thought, that



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that Lord *Thomond* had not in his view this large encrease of his personalty? If the Court should say he had not, it would be laying down dangerous things: He might reasonably think his personal estate would advance; he might have sold part of his real estate, or the legatee of 20,000*l.* might have died before him; in which cases, the personal estate would have grown large; all these accessions might be in view, and it is dangerous and absurd to say, that because a residue is given, that therefore some money *must* be given.

But to go into the evidence itself, it will make against Lord *Inchiquin*; for there appears to be a strong intention in Lord *Thomond* to preserve this estate in his name, and his favour was to the name of *O'Brien*, which is the name of some of the old kings of some of the provinces in *Ireland*. He had also a notion of paying his debts, and could it be thought, that he had a design of weakening his real estate merely to ease his personal estate, and for the sake of giving it to Lord *O'Brien*, who was but a child of nine or ten years old at the time, and not much more at the time of his death? Suppose the personal estate had been 30,000*l.* at the time of the testator's death, could it be said he intended to give that away clear, and to throw all his debts upon his real estate, to which he paid such a particular regard? If it had been two particular parts of his personal estate, as plate, pictures, &c. which he intended to have preserved, it might have been reasonable, and those he might have disposed of as heirlooms.

Upon

Upon the whole, I am of opinion, that the construction must be made according to the express words, and that there is no necessary implication arising out of the will to over-rule them, and the personal estate must be made liable to debts, legacies, and funeral expences in the first place in aid of the real estate, and if any deficiency, that must be made up out of the real estate.

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against  
Lord  
INCHQUIN.

The next question relates to the legacy of 20,000*l.* given by the will to Sir *William Wyndham* and by a codicil, attested by two witnesses only, declared to be in trust for Lord *Clare* :—As I have delivered my opinion, that the personal estate is liable to legacies and the real estate is to make up deficiencies, there is no doubt but this is a proper legacy, and the trust well declared, although the codicil is attested by two witnesses only ; otherwise, if the real estate had been only liable, and the personal estate exempt, for then the codicil should have been attested by three witnesses, and this falls directly within 2 *Atk.* 368. the case *Brudenell* and *Boughton* before me.

*SMITH against VAUGHAN.*

IT is not a motion of course, That when a receiver is appointed and has given security, he shall put the parties to the expence of a change ; and in order to intitle himself to be discharged from the receivership he must have an affidavit to shew some reasonable cause for such discharge, otherwise the motion will be rejected.

When a receiver is appointed, and has given security, he must shew a reasonable cause to entitle himself to be discharged.

Lord

1744

Lord  
ORRERY  
against  
NEWTON.

Lord ORRERY *against* NEWTON.

An injunction will be granted before answers to stay waste by a person having no interest in the thing wasted, but merely acting as a servant.

1 Ves. 476.

THE executors of the late Duchess of *Buckingham* moved for an injunction against the defendant before his answer came in, upon this case: The defendant acted as servant to the executors in some alum mines, at the rate of 20s. a ton and that he was to quit the service at any time upon a month's notice: He now refused to let the executors intermeddle with the alum and threatened to carry it off, together with all the utensils and to strip the whole work and this injunction was prayed to restrain him.

LORD CHANCELLOR. I do not choose to grant injunctions before answer; the general injunctions are for staying of waste, which are established by the rule of the court; injunctions to prevent special damage and destruction: And injunctions to prevent force founded upon the several statutes against forcible entries; But in these cases, injunctions never go till after answer come in, but the present is not like any of those, but rather like injunctions to restrain an executor or administrator from wasting of assets and where there is proof of an intent to waste assets, the court will enjoin before answer: Because otherwise they may be wasted before the creditors, or legatees, or next of kin, who are intitled to them can lay their right before the court: That case is not like the present, but a great deal may be inferred from it in favour of the present injunction:

For

For the defendant in the present case is no more than agent or servant : For if he had an interest or right founded upon the articles which constitute his agency, I would not grant this injunction before his answer came in : But as it is stated by the bill and the affidavits, That it was not an agreement by which the defendant was to have an interest, but only to act as a servant, or minister for the benefit of the plaintiff, who could determine the agency at a month's notice, therefore the injunction may go.

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Lord  
Orrery  
against  
Newton.

But if an interest had passed to the defendant I should have been of opinion that to come here for an injunction to restrain the use of that interest or property, would have been too early before answer : But in this case it falls within the reason of that of an executor or administrator wasting of assets, where upon reasonable evidence of damage or waste intended, the court enjoins before answer.

Therefore let an injunction go or be granted upon the terms of the notice, till answer and further notice.

*Eccleston against BEAKLEY.*

A MAN after his marriage brought several incumbrances upon his estate, of which his wife was dowable, and the account was before the master in relation to the several incumbrances, and upon motion for the doweress to be paid her dower, Lord CHANCELLOR said the defendant is a doweress and ought to have relief without staying for the account

A separate report directed of what was due to a doweress, without entangling her in a general account of incumbrances.

taken

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 ECCLESTON  
*against*  
 BERKLEY.

taken as to the incumbrances, for she is intitled to her dower out of the rents and profits prior to any body else : And as there is a direction by the decree among other things to see what is due for dower out of the rents and profits of the estate : Therefore let the master make a separate report of what is due for dower without entangling her for the sake of the general account.

March 14th.

PARTRIDGE *against* PAWLETT (a).

Tenant for life *sans* waste, is restrained by injunction from selling timber, afterwards his creditors obtain an order for a sale, a receiver is appointed for the money arising from the sale ;— but the tenant for life dies before the timber is sold :—  
*Quare*, Are his representatives entitled to the benefit of the timber?

A BILL was brought by creditors against a tenant for life without impeachment of waste, and upon his proposing to sell the timber, an injunction went against him to stay him from selling it, and afterwards upon an application by the creditors there was an order obtained for the sale of the timber, and a receiver appointed for the money arising from it, but before the timber was fallen, the tenant for life died, so that by law the timber went along with the land to the remainder man. This injunction was obtained upon a suggestion of the greatness of the debts which upon the master's report turned out to be only 45*l*. the timber was worth 2500*l*, and the tenant for life had agreed to have sold it for so much, if he had not been restrained by this court.

And now a motion was made on behalf of his personal representatives, that they might have the benefit

(a) A case of the same name is reported, 1 *Atk.* 467. but takes no notice of the point here stated.

benefit of this timber, and it was insisted that the act of this court will not do injustice or deal cruelly with any person, that the tenant for life would have disposed of this timber, if he had not been checked by the command of this court, which in this case has stripped him and his family from the property of this timber at law; and as this court can, it ought in justice and conscience to restore it to them; it is common in such orders for injunctions to insert specifically, that the tenant for life shall be no sufferer in cases of actions or death; but that is omitted in the present case:—But the question is, whether such a clause is not tacitly and in conscience annexed to every such injunction? If it is not so, the parties will lose 2500l by the act of a court of conscience; and the remainder-man will gain it, who, without the injunction, would have had no pretensions, because the timber would have been severed and sold.

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PARTRIDGE  
against  
PAWLETT.

Lord CHANCELLOR thought this a question of too great moment to come on upon motion, and therefore ordered it to be put into the paper; but that he remembered a case very like it, where Mr. *Wyndham Ash* was restrained from receiving part of the rents from his wife's estate:—He died before the receipt of them, and it was insisted that they being *chofes in action* would survive to the wife, and would not go to the husband's executors; but the court decreed in favour of the executors.

The counsel at the bar said it was the case of *Lincoln v. Robinson*, but I cannot find any such case.

MARSH

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MARSH  
against  
BATHOE.

## MARSH against BATHOE.

A solicitor  
may detain  
title deeds as  
against client  
'till payment  
of his bill,  
but against  
persons who  
have antece-  
dent rights.

Vern. &  
Scriv. 171.

A BILL was brought by legatees and creditors in order to have an estate sold and a decree for sale accordingly. The defendant who was the proprietor moved to have the title deeds out of the hands of his solicitor; but the court thought the solicitor had a right to retain them against him till he was paid his bill of cost in the suit: And now the creditors and legatees moved to have the title deeds to be brought before the master in order to make a title to the purchaser; and it was insisted for the solicitor, that he should not be obliged to deliver up the deeds which were his security for his cost: That he was in the nature of a mortgagee who had a lien upon the deeds prior to the creditors and legatees, who claim under the decree; and that they are to pay him his bill of cost before they shall be let in, as it were, to redeem.

Lord CHANCELLOR. If I was to suffer the solicitor to retain the title deeds in this case, 'till payment of costs, I should be ordering a defect of justice: For in most cases where there are decrees for sale, or for accounts, there would be collusions between the client and solicitor to lay an embargo upon the title deeds, and thereby preventing sales of estates; or upon papers, and thereby defeat the taking of accounts which would, in fact, be making the solicitor more powerful than this court;  
indeed

indeed where the question is between client and solicitor, the latter may detain the deeds or papers till payment of his bill: But where there are persons, who have antecedent right to the solicitor, as the creditors and legatees have in this case, (for their right or charge upon the estate is by the will of the testator) there the solicitor shall not justify a detainer of them; for if he could, no justice could be obtained, and the party might lay a heavier charge upon the deeds than what the estate was worth: upon the bill brought for an account and sale, the defendant put his deeds into the solicitor's hands, who, after filing the bill, has laid out money upon the suit. If there is a decree for the plaintiff, the solicitor cannot detain the deeds against him, who is a stranger to the transactions, and has an antecedent right to the solicitor himself: For take the thing in the strongest way you can for the solicitor, he will appear to be no more than a mortgagee who advances money upon the deeds with notice of prior incumbrance by the *lis pendens*, which he must have notice of necessarily, as solicitor, and if there never was a precedent in this court before, I will make one now; and therefore let the deeds and writings be brought before the master.

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MARSH  
against  
BATHOR.



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CLOSE  
against  
HEMLYN.

CLOSE against HEMLYN.

The court  
will only in-  
terfere in  
cases of ne-  
cessity before  
answer put  
in.

UPON a bill brought, before answer put in, a motion was made by one executor to compel his two companions to sell wines which were in their custody, upon affidavits of their growing worse and decaying, but the two other executors appeared in the same affidavits to be of a different opinion.

The court refused to interpose before answer put in;—That the court will do acts of necessity, but not of convenience, till the state of the case appears on both sides; especially as here is no affidavit of the commission of any waste or destruction.

POWEL against PRENTICE.

A feme co-  
vert is liable  
to be arrest-  
ed by the ser-  
jeant at arms  
for not put-  
ting in a  
separate  
answer pursu-  
ant to an or-  
der obtained  
at her own  
request.

THIS is a motion to take up a *feme covert* by the serjeant at arms, she not having answered upon an order for that purpose separately from her husband.

LORD CHANCELLOR. If *feme covert* moves for liberty to put in a separate answer, and afterwards does not, the Chancellor, upon suggesting that fact in the warrant for a messenger to take her up, will not scruple signing the warrant; for she has  
by

by her own act, put herself into the condition of a *feme sole*.

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POWELL  
against

PRENTICE.

It afterwards appeared upon a subsequent motion, that the order for the wife's putting in a separate answer being obtained at the application of a third person would not warrant the taking her up by a serjeant at arms, for want of such separate answer : but that it ought to be obtained at her own suit ; for her own act is requisite to put her under the circumstances of a *feme sole* ; however, it was not part of the motion to set aside the warrant for this irregularity : but the wife consented to put in her answer jointly with her husband at his expence, and as soon as that was done she was ordered to be discharged.

JACKSON *against* BARNARD.

THIS was a motion by the ancients of *Clements Inn* to restrain the defendant by injunction from making use of a large press engine for the squeezing of fruit, in order to obtain a spirit out of it, upon an affidavit, that the defendant was a tenant of a cellar in the inn, in which he had fixed this engine ; that it moved with vast force, and being placed in an old imperfect building ; that it had decayed it, and was likely to injure it very much : That people were afraid to live in the chambers over it : That the defendant had got a new parcel of fruit, and was going to squeeze

An injunction to restrain a man in the exercise of his trade refused before answer.

S 2

But

1744.

JACKSON  
against  
BARNARD.

But the court refused granting an injunction before the answer came in, and the bill had not been filed above two days: For such an injunction would in effect be restraining the defendant from pursuing his trade. If he does any special injury by an abuse of the cellar which he has rented, the society may have their action, and be recompensed in damages.

ROWLAND *against* POWELL.

A demurrer allowed to a bill of interpleader, for that no legal step by distress or otherwise had been taken.

MR. *Barneſſy* made a conveyance of all his estate to *Manſell Powell* in fee, who granted leases of several parts of the estate upon his rents; Mr. *Barneſſy* some years after this is found to be of insane mind, and incapable of the conduct of himself, or his estate at the time of executing such conveyance to *Powell*:—The committees of the estate bring their bill against *Powell* to set aside the conveyance: but do not make the several lessees or tenants of the lands parties to such bill. And now the several tenants bring their bill of interpleader against the committees, and Mr. *Powell*, suggesting, that they know not to whom of right they ought to pay their rent, and fear they may be hurt by some of the claimants, therefore pray that the defendants may interplead and adjust their right, and that the defendants may be at liberty to pay their money into court and be indemnified; and that the defendants may be restrained from receiving rent, or distraining for it until the right is determined.

To

To this the defendant *Powell* demurs; for that there has been no legal step taken by distress, or otherwise to recover the rent. And it was insisted for the plaintiff, that interpleading bills may be brought upon a possibility of the plaintiffs being liable to a double payment or recovery: and that, if the plaintiffs should pay their rent to Mr. *Powell* upon his distresses or actions against them, they will also eventually be obliged to pay them over again to Mr. *Barneſly*, when the conveyance to Mr. *Powell* is set aside: That there is no occasion to stay until one of the parties has taken some step at law to recover rent, or to distress the plaintiff, and in *Equity Cases abr.* 80, it is said in the margin, that such bills may be brought whether any suit be actually commenced against the party in law or equity, or he is only in danger of being molested.

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ROWLAND  
against  
POWELL.

LORD CHANCELLOR. This court will be cautious in entertaining bills of this sort brought by tenants to enjoin persons from receiving rents, who are intitled to the possession; for that would be making bills of this nature to have the same effect as the appointing a receiver would: But before that can be done, the merits of the committee's bill must come before the court, and you shall not obtain a receiver by a side-wind.

It is said truly, that an interpleading bill may be brought where no action has been commenced: But that can only be where there are two claimants, each of whom can have his remedy at law by action against the plaintiff in the interpleading bill for the same demand, and that the party may not be distressed

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 ROWLAND  
*against*  
 POWELL.

treffed at law, he shall be protected by such bill in this court; whereby he may compel the claimants to interplead between themselves: But the present is not a case of that kind: For the committees can have no remedy against the tenants for these rents: For it is admitted that the lunatick is out of possession, and therefore the committees have no remedy for those rents, either by distress, or by action founded upon a contract or tort; because the contract is with another person to whom the rents became due, whether the leases are for years or at will, and from whom the tenants received the possession. And there can be no action grounded upon the tort or trespass till the committees have recovered in ejectment; in the bringing such ejectments the committees may lay their demise back, and recover the mesne profits upon an action of trespass against *Powell*, but not against his lessees; but no ejectment is brought, by the committees here, and these bills have been received only where ejectments have been brought, as in Sir *John Lee's* case, where ejectments were brought on both sides;—and distresses also for rent. The tenants then applied for interpleader, and were relieved,

And as to what is said, that there is a possibility that these tenants, if they pay their rent to *Powell* upon compulsion, may, in this court be again compelled to pay it to the lunatick, as they have notice of the bill brought by the committees, there can be no such remedy against them, and the committees have not made the tenants parties to their bill; and if they had, I think they would not be answerable.

The demurrer allowed.

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GAGE  
against  
BULKELEY.

GAGE *against* BULKELEY.

THIS was a bill brought by the plaintiff in order to have an account of French East India actions to the amount of more than 40,000*l.* deposited with one *Cantillon*, a banker in Paris, by way of securities or pledges for several sums of money in 1720, and 1721. *Cantillon* is dead, and the bill is brought against the defendants, his executors, who pleaded specially to this bill, that a sentence was given upon this very demand in a court of foreign jurisdiction in France, which by an arret of the French king, had a sole exclusive authority of determining all matters in relation to E. India actions, and therefore the defendants submitted, that they were not obliged to answer again to the same demand in this court. To this plea, two sort of objections were taken: The first, that no foreign sentence could be pleaded in bar to a bill brought in this court in *England*: The second, that if a foreign sentence can in any case be so pleaded: yet, that the present is not such a sentence; and it was, in the third place urged that this plea was imperfectly and insufficiently pleaded.

The sentence of a court of summary jurisdiction in France cannot be pleaded to a bill in the Chancery of England for the same matter.  
3 Atk. 215.  
S. C.

LORD CHANCELLOR. Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it

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GAGE

against

BULKELLY.

it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and are only bound by judicial sentence given under the same sovereign power by which they themselves act: As if judgment be obtained in one court in this kingdom, and an action is brought in another court, here the judgment may be pleaded in bar, if it is for the same demand, because such judgment binds both the courts, and the party.

So a decree obtained in the *Exchequer* here may be pleaded to a demand for the same thing in this court for the same reason. But though a foreign sentence cannot be used by way of plea in the courts here, yet it may be taken advantage of in the way of evidence: And therefore if trover be brought in *England* concerning the property of a ship, and there be already a sentence in a foreign kingdom, touching the property of the same ship, you cannot plead it as a judgment, because it does not bind the court as such; yet you may give it in evidence to bind the property, and may have a verdict upon it: For though it does not bind the court as a judgment, yet it may and does the justice of the case between the parties themselves. You cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may an *assumpsit* in nature of debt upon a simple contract, and give the judgment in evidence, and have a verdict. So that the distinction seems to be, where such foreign sentence is used as a plea to bind the courts here as a judgment, and when it is made use of in evidence as binding the justice of the case only.

Mr.

Mr. *Attorney General*. In support of the plea. To be sure the law is as your lordship has represented it ; for the judgments of foreign courts cannot be urged by way of pleas in the courts of law here, nor even upon actions at law founded upon foreign sentence is the declaration to state the demand as a judgment, but as a promise, and it may be given in evidence as a proof of such promise :—But though these things be so at law ; yet the known usage of this court is different from that of law : For there parties are tied down to precise strict rules, one of which is (though somewhat relaxed of late) that you can never plead what may be given in evidence without pleading it ; but this court allows of pleas which in their nature are not good at law by way of plea, but are so in point of evidence, a stated account is a common plea in this court ; but it cannot be pleaded at law to an action brought upon an *indebitatus assumpsit*.

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against  
BULKELEY.

Lord CHANCELLOR. But you may plead an account stated in bar to an action of account at law ; and the present is a bill for an account.

Mr. *Attorney General*. There is a great difference between pleas in courts of law and pleas in courts of equity. A plea in bar to an action at law must be good in the whole or it is bad in the whole : But in this court, it may be good in part, or bad in part. Another difference is this, a plea at law is final and conclusive to the parties : For if the court rules the plea against the defendant, the plaintiff takes judgment for his demand : But in equity a plea is only trying the opinion of the court beforehand,



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 GAGE  
 against  
 BULKLEY:

hand to prevent other disputes: For although the plea is over-ruled, the whole case is still open to the court: The only design of pleas in this court is, that if a person can state a fact shortly by his plea which the court shall think a sufficient defence or answer to the bill, the court will not then suffer the parties to go on to an unnecessary expence in litigating other matters in the bill which are immaterial, but only puts them upon the proof of the fact contained in the plea; and if he afterwards proves that to be true, the bill shall be dismissed: And in arguing pleas in this court, the fact at the argument is taken to be true; and the question is, whether the fact is a sufficient defence?—If it is held to be so, the defendant is to go into the proof of it after the argument. I shall now consider what weight foreign sentences have where they are given in evidence upon actions brought in the courts of law here; and it is clear, that they are given in evidence conclusive and undeniable, and not as circumstantial evidence to be weighed in the balance with evidence on the other side: For the courts here pay such reverence to them as the sentence of a court sitting to do justice, in the same manner as they themselves; and it is for that reason that they receive them as binding and conclusive evidence.

Sel. Ca. in C.  
 69.  
 2 Stra. 733.  
 2 Eq. abr.  
 525. c. 7.  
 Mosel 1.  
 12 in. abr. 87.  
 pl. 9. N. P.  
 231.  
 Theo. Evid.  
 39.

In Lord KING's time, there was an action brought at law for seamen's wages, and the plaintiff gave in evidence a sentence for them in the court of Admiralty here; and he doubted whether such sentence was to be received as conclusive evidence; he consulted with Lord Chief Justice HOLT upon it; and they both determined that it should be conclusive

clusive evidence. The name of the case was *Burrows v. Jemino*. If a marriage is questioned at law, and in order to prove it, the parties produce a sentence to that purpose in the ecclesiastical court, it is conclusive evidence, and so ruled by your Lordship at *Guild-hall* upon hearing civilians. And for the sake of justice and public convenience, when foreign judgments are given in evidence in the courts of *England*, they receive them as conclusive evidence, and pay the same regard to them as to sentences given in the courts of admiralty or ecclesiastical courts here.

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GAGE  
against  
BUTLER.

In the case of *Hamden* and the *East India Company*. Mr. *Hamden* was in the *East Indies*, and the Dutch seized his ship, and condemned it; after this a Dutch ship coming into *Scotland*, Mr. *Hamden* attached her for satisfaction, when the question came before the admiralty in *Scotland*, the court gave him liberty to enter into the legality of the condemnation: But upon appeal to the sessions in *Scotland*, that sentence was reversed; and upon appeal to the House of Lords here, the last sentence was affirmed, because the sentence of the Dutch admiralty was conclusive evidence; for it was *res judicata*, and could not be unravelled or re-examined here,

We are to suppose that here has been a question in *France* concerning a transaction there before a proper court of jurisdiction, to which the parties were subject, and a final sentence was given there; and now a bill is filed for the same demand in this court; such sentence would be conclusive evidence at law, and no doubt but it would be the same upon a hearing

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GAGE  
against  
BOLLESLEY.

a hearing in this court. But we also imagine it is good by way of plea in this court: For if it would be conclusive to them at the hearing, it may as well stop them short at the plea, to save great trouble and expence; and though they should go into evidence to question the legality of this sentence, yet the court at the hearing would not receive it, for that would be entering into a re-examination of a foreign sentence, which in a course of evidence is not enquirable into, but binding and conclusive. There are many cases, where an account cannot be pleaded at law, and yet this court will receive such plea; as in the case of partners: At law they cannot maintain account against each other: But upon a bill for an account in this court by a partner, if his companion pleads an account stated, this court will receive it, though at law it would be rejected; this court will receive a plea founded upon a presumed or implied settling of an account: as where accounts were regularly sent over every year from one merchant to another, and acquiesced under, that may be pleaded.

Lord CHANCELLOR. I never knew a case of that sort of plea, though it has been a sufficient defence upon answer.

Mr. *Attorney General*. Suppose a bill in this court to redeem a mortgage, and the mortgagee plead forty years possession without any demand?

Lord CHANCELLOR. Such length of time cannot be pleaded but must be insisted upon by way of answer.

Mr.

Mr. Attorney General. I have seen a demurrer of that kind, because the length of time appeared upon the face of the bill.

1744.  
Gaol,  
against  
BULLOCK.

Lord CHANCELLOR. I do not remember any such case.

Mr. Attorney General. A plea in equity is this, if a defendant can state such matter in his plea as (if true) will be a bar to the plaintiff's bill, it shall be received to save the expence of the parties upon other matters. In the arguing of pleas, every charge in the bill is taken notice of, nay admitted and allowed, upon this principle, that taking both cases together, if the defendant has a just bar, his plea shall stand, and the plaintiff is not concluded: For if he has any new matter to charge, he may amend his bill: And in the case of *Diggs v. Colebrook*, it was amended three times after the arguing three several pleas. He concluded by saying, That the sentence of a foreign jurisdiction had been received by way of plea in the court of *King's Bench* here, 3 *Mod.* 194. The case of one Mr. *Hutchinson* who killed Mr. *Coffin* in *Portugal*, and was acquitted there of the murder, the exemplification of which acquittal he produced under the great seal of that kingdom being brought from newgate upon an *hab. corpus* to the court of *King's Bench*: Notwithstanding which, the king was very willing to have tried him here for the same fact—the consideration whereof he referred to the judges, who all agreed, that he being already acquitted by their law, he could not be again tried here.

Barnard, C.  
52.

1 Show. 6.

Mr.

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 GAGE  
 against  
 BULKLEY.

Mr. *Wilbraham*. The question is, Whether the sentence of a foreign judicature, which had proper jurisdiction, can be pleaded to a demand for the same thing in this court; and this may depend upon what force foreign sentences are in Courts of law or equity in this kingdom, that in all cases such foreign sentences may be taken advantage of in evidence both at law and in this Court: and if they cannot be used by way of plea in some cases, there may be a defect of justice. Every foreign sentence for the recovery of money is of the same force in this kingdom as a simple contract: Now if an action is brought upon an *assumpsit* in *England*, the defendant may plead any other simple contract by way of set off: and if he cannot plead a foreign sentence by way of set off he will be injured.

Lord CHANCELLOR. This case does not come for a final determination here; for whatever order I shall make, it will leave the merits quite open, as if no order had been made.

The first question is, Whether the subject-matter of the plea is good? The second is, Whether it is well pleaded? The first question depends upon this, Whether the sentence or judgment of a foreign Court can be used by way of plea in a Court of justice in *England*? And no authority either at law or in equity has been produced to shew that it may be pleaded: and therefore I shall be very cautious how I establish such a precedent (*b*). The case in  
 3 *Mod*.

(*b*) The judgment of a foreign court is not considered as a record, and therefore cannot be pleaded with a *prout patet per recordum*:

3 *Mod.* 194. 1 *Show.* 6. is no proof; for the sentence of acquittal in *Portugal* was not produced there by way of plea to any indictment there for the same murder: For as the murder was committed in *Portugal*, the Court of King's Bench could not indict him, and there was no method of trying him but upon a special commission, founded upon the statute of 33 *Hen.* 8. c. 23. and that by a liberal construction of the statute; which enacts, That murders committed within the king's dominions, or without, may be tried in any county where the king by his commission shall appoint; and it was by virtue of the word "without," that this kingdom had any consueance at all of a murder committed at *Portugal*. This statute was only intended to take in murders committed in *Scotland* and *Ireland*; but by a very liberal construction it is extended to take in murders committed in any foreign dominion whatever; and I remember a trial of that kind in the Old Bailey of a lieutenant in Sir *John Norris's* squadron, who killed a person in *Newfoundland*: However, the question in the King's Bench in Mr. *Hutchinson's* case, was not upon an indictment, or any other proceeding in which the foreign sentence of acquittal could be pleaded; for he was only removed there by *habeas corpus*, and it was referred to the judges to know whether a commission should issue upon the statute 33 *Hen.* 8. c. 28. to try him over again? And the judges very rightly and mercifully thought not, because he had undergone

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GAGE

against

BULKELEY.

*cordum*:—it must appear in evidence, and as such, it is examinable. *Walker v. Witter*, *Doug.* 4. *Sed. vid. Galbraith v. Neville* in the notes to the third edit. Lord *Kenyon's* doubts concerning this doctrine.

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*GAGE*  
*against*

BULKLEY.

undergone one trial already, and the sentence of acquittal was only produced to shew that.

As to the general question, Whether a foreign sentence can be pleaded here? I think clearly it cannot at all be pleaded in a Court of law, for the reasons I offered in the outset of this case. But it is said it may be pleaded in equity, because pleas there differ in their nature from pleas at law; or at least they differ from them in several respects: as, at law, if the defendant pleads in bar, and the other party takes issue upon the facts in the plea, the fact shall be tried by a jury before the plea shall be argued, but after that the judgment either way shall be final upon each party: But in Courts of equity, all pleas come on immediately to be argued upon their relevancy before the fact of them is verified; and if the plea is over-ruled, the defendant is not barred from any other defence which he may set up, but only from the defence set up in his plea.

So if the Court be of opinion for him, then he is to prove his plea to be true upon every circumstance, and at the hearing the facts are only proved, and the Court does not go into any argument, but dismisses the bill; but still this is not conclusive to the plaintiff; for he, after the allowance might amend his bill, and set up any other defence, for the plea only concludes such charges as are then in the bill.

Courts of equity admit of equitable bars, which Courts of law cannot. But this does not arise from  
any

any difference in the reason of the thing, but from the difference in jurisdiction; for as this Court allows of equitable demands, it must necessarily allow of equitable bars. But it is not for these reasons that you can turn every defence into the shape of a plea in this Court, for then many sorts of defence might be let in, which cannot be pleaded; length of time, in general, is a good defence; yet as it may depend upon many circumstances, you cannot plead it, but in such cases as you are warranted by some statute; but the party may have the advantage of such defence by his answer.

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GAGE  
against  
BULKELINE.

Pleas in equity are either to the jurisdiction of the Court where it proceeds by English bill, or *subpoena*, or they go in bar of the demand. If a bill is brought to impeach a purchase, for valuable consideration, without notice, the defendant may plead himself to be a purchaser without notice, because that is an equitable bar; but here it is insisted upon, that this sentence in the Courts of actions in *France* is a bar to this Court here: It is true, such sentence is an evidence, which may affect the right of this demand when the cause comes to be heard; but if it is no plea in a Court of law to bind their jurisdiction, I do not see why it should be so here.

Pleas in equity are either to the jurisdiction, or in bar of the demand.

Ca. Temp.  
Hardw. 87.  
Doug. 4, 5.

The second part of the consideration is, supposing the subject-matter of the plea might be pleaded, whether it is well pleaded in this case, this depends upon the several exceptions which have been taken to it, some of which are general, and some very particular ones: The general ones consist in this, that there is a plea of a decree given by a summary

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jurisdiction



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 GAGE  
 against  
 BULKELEY.

jurisdiction constituted by an arrêt of the French king, and excluding the ordinary jurisdiction of all his other Courts as to decisions concerning French *East India* actions; and that to make such arrêt effective it ought to be registered, and that it is not set out in this plea to be registered, and of consequence, till such time, the Court had no power or jurisdiction.—In answer to this it is said, that point is not so clear, for it is a very litigated one in *France*: And, secondly, Supposing a registry to be essential, that there is a sufficient averment of a registry in this plea: For it is averred, that the sentence was conclusive according to the laws of *France*, and this is further made use of to answer all the exceptions taken to the plea. I shall not enter into that point at present: but it would be a strong argument not to allow of a plea of a sentence of a summary occasional Court, if its jurisdiction was but doubted in the country where it is erected: The parliament of *Paris* it seems would not allow the legality of this Court, and many of them were imprisoned for their opposition to it, and I should make a great difference as to the allowance of a plea of a sentence given in the parliament of *Paris*, whose jurisdiction is immemorial, and of great credit and esteem over all Europe, and that of a Court of summary proceeding erected occasionally to serve some political ends, and has an exclusive jurisdiction given it, to the diminution of the rights of all the ordinary Courts of justice there.

It is a strong argument against allowing a plea of a summary occasional Court that its jurisdiction is doubted.

Another question is more particular, and it seems that the arrêt erecting this court of actions empowers all

all the commissioners, or seven of them to do judicial acts, and it is not pleaded, that the sentence was pronounced by seven commissioners: This is a very strong objection, for you cannot make this plea of a sentence of a court of summary jurisdiction in *England*: Suppose a plea at law, or in equity upon any act done by commissioners of forfeited estates or commissioners of bankrupts or justices of peace, the plea will not be good, unless you state the act to be done by the *quorum*, or a sufficient number who were empowered to act. In the present case seven commissioners were required to the doing any act, and that plea would certainly have been fatal at law: Indeed when you set out the proceedings of courts of ordinary jurisdiction, the common way of setting them out generally is sufficient: But where there is a new or summary jurisdiction erected, you must in pleading set forth the jurisdiction particularly: And that the sentence was according to the jurisdiction.

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Where an act of a summary jurisdiction is pleaded, it must appear to have been within their jurisdiction.

Another objection has been taken, That the matter now in dispute was not within the jurisdiction of this court of actions, for the *arrêt* does not seem to extend to this case: And as to this the case is very doubtful.

All I can do is to allow this plea to stand for an answer, with liberty to except at the hearing of the cause: But it is said, this order would occasion great expence, by letting in many proofs which may not be material: But it comes out upon argument that this will not occasion a shilling more expence than the other way would do; because it is insisted, and

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rightly too, that the law of *France*, as to the several exceptions to this plea, is matter of proof, That as the point of a foreign law are in dispute, this court cannot take notice of what the law is without proof of it. Suppose I should now determine this plea to be good *in toto*, nothing more would be necessary for the defendant but to prove the plea; and therefore he begins at the hearing of the cause first: And if the facts are true he shall have a decree. But in the present case it would be too perilous for the defendant to stick to this plea: For the proof required will not be only a matter of fact, as that such sentence was given, but the law of *France* itself will be matter of evidence: As whether this court of actions had jurisdiction of this cause before registry; or whether it was comprised in the words of their arrêt, and to prove the law in this case, the Court will receive printed reports, counsels opinions if the case is clear (c): but if doubtful, it becomes matter of other evidence, and the law must

(c) It should seem, however, that the opinions of counsel will not be received in evidence in opposition to a judgment of a foreign Court;—*Walpole v. Ewer*, tried before Lord KENYON, at Guildhall, November 1789. An action upon a policy of insurance for a Danish East Indiaman and cargo to *Bengal*, the coast of *Coromandel*, and back to *Copenhagen*.—The vessel had returned safe, but the goods which had been insured were damaged by foul weather, and the plaintiff brought this action to recover the average loss, calculated at 6l. 5s. *per cent.*—This is not allowable by the law of *England*; but by the law of *Denmark* a deduction was to be made from the *respondentia* bond, which being a contract of indemnity, made the underwriter liable for the deterioration of the cargo.

must be proved ;—and all this must be proved, not in point of fact, but of law.

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If this then is the case, the defendants would not rest their cause upon this proof only, without examining into the merits of the case : For if the Court should be of opinion against the defendant upon any point of the law of *France*, this plea would not be verified ; and if he had not examined into the merits, the plaintiff would upon them have a decree against him.

Let the plea stand for an answer, with liberty to except at the hearing of the cause,

GAGE

To support this case, the judgment of the Court of *Copenhagen* was produced, and authenticated by the *Danish* consul, where the judges decreed in a suit upon another part of the cargo of this very ship, that the underwriter, from the nature of the policy, is liable, and that the average loss upon the goods should be deducted from the *respondentia* bond.

*Beacroft*, for the defendant, said he could produce the opinions of some *Danish* lawyers in opposition to this judgment.

LORD KENYON. After this judgment, every thing else is waste paper.—I remember when Judge WILMOT opposed the *obiter dicta* of Sir *Jos. Jekyll* to the judgment of Lord HARDWICKE, Lord CAMDEN supported the latter, and said, that one solemn determination of Lord HARDWICKE was worth one hundred *dicta* of any other judge.—There seems to be a good deal of sense in the *Danish* law. MSS. *Ni. Pri. Cases*.

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March 23.

GAGE against BULKELEY.

*A.* borrows a sum of money from *B.* with whom he deposits government securities as a pledge, upon condition not to sell them until failure of payment at a certain day:—This is such a transaction as may be affected by the statute of limitations. A person beyond sea, and so within the saving of the statute of limitations, need not return to enable him to commence a suit.

MR. *Gage*, the plaintiff, in the year 1720 borrowed of Mr. *Cantillon*, a banker at *Paris*, a sum of 4000*l.* for which he gave him his note to repay him with interest at the end of half a year, and at the same time deposited with him French *East India* actions to a much greater value, and also 3000*l.* by way of pawn or pledge for the 4000*l.* upon condition not to sell the actions till a failure in payment, according to the time mentioned in the note: The plaintiff has never been in *England* since this transaction; but has now brought his bill against the representatives of Mr. *Cantillon*, to have an account of the pawn of *East India* actions, charging a breach of trust in *Cantillon's* selling the deposits before the time fixed. To this the defendants plead the statute of limitations.

And the counsel for the defendants insisted upon two things, That the nature of the demand in the present bill is barrable by the statute of limitations, a mere trust must be admitted not to be barrable by the statute of limitations; it only barring such demands for which the party may have an action: But as no action can be brought for a mere trust, therefore a trust is not within the bar of a statute of limitations; but if the demand be of such a nature as the party has a mixed or double remedy,  
either

either by action at law, or by bill in equity, as the statute will reach to bar the action at law, it shall also affect the right in equity, and may be pleaded in bar to a bill in equity for such demand; and it has been determined that if a man receives the profits of an infant's estate, and the infant neglects his right for six years after he comes of age, and then brings a bill for an account, the statute of limitation is as much a bar to such a suit, as it would have been to an action of account brought by him at common law; for this receipt of the profits of an infant's estate, is not such a trust as being a creature of the court of equity, the statute shall be no bar to: For the infant might have had his action of account against him at common law, and therefore there was no necessity to come into this Court for an account; for the reason why bills for an account are rather brought in a Court of equity than law, arises from the nature of the demand, and from convenience rather than necessity; for in equity they may have a discovery of books, papers, and the party's oath, for the more easy taking the account, which cannot be so well done at law: and as the infant by lying by too long is barred of his action of account at law, so shall he be of his remedy in this Court, and there is no sort of difference in reason between the two cases.

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The demand by the present bill is not a mere trust, but such a right as the plaintiff might have had his action for at law. Indeed he charges in his bill, that Mr. *Cantillon* was guilty of a breach of trust, in selling the deposits before the period agreed upon for that purpose. But this is no more than

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than a breach of contract, for which the plaintiff had his remedy at law, for he might have brought his action upon the case against him for so much money had and received to his use : and as the statute has barred him of that remedy at law ; it will also bar any remedy in equity for the same demand. Suppose a deposit is made without a power to sell, but only for safe custody, and the party sells the deposit, an action of trover will lie ; but if it is not brought within six years, it will be affected by the statute, and so would a bill for an account of such deposit : Put the present case in the strongest light, and it will only appear, that Mr. *Cantillon* has sold what he ought not to have done, and yet an action of trover would lie at law, and if the present demand is to be made a trust, any demand may be made a trust. The reasons upon which the statute of limitations are founded are very wise and political, in order to prevent the setting up stale demands upon a presumption of payment or dereliction : For if a man has no impediment to make a claim of a personal demand, neglects to do it for a course of six years, he shall be barred by the statute, upon a presumption of payment, or dereliction of his right. But this statute does not reach a trust, neither in expression, nor meaning. For as to the words, the statute mentions no sorts of remedy, but by actions at law, for the words repeated all along, are applicable to remedies at law, constantly making use of the word "actions ;" and as to the intention of the statute, it was never meant to take in trusts, because there is no presumption of neglect or dereliction by lapse of time : For if an estate is put in trust, the trustee going on

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to perform his trust, his possession is the possession of his *cestui que trust*: so that there is in such case no neglect of the party, or any occasion to bring any suit, or make any claim, because the trustee is acting according to his trust and duty: So in the case of stock taken in the name of another person: The *cestui que trust* receiving the dividends, the statute will not run against that; because there is no adversary possession: But in this case, there is no trust; for an action upon the case might have been upon the receipt of these deposits by which Mr. *Cantillon* promised to be accountable: The trust upon these deposits was by the agreement, but to continue half a year, which expired at that time, and then Mr. *Cantillon* was at liberty to sell them; may, the trust determined sooner by the breach of it in selling the actions before that time; and that was the foundation of your lordship's opinion in the case of *Sturt and Mellish*, where there was a letter of attorney given to receive money upon debentures and to be accountable for it: The party applied the money to his own use, and upon a bill and plea of this sort it was insisted that it was a trust; because he was not to receive the money to his own use, but for his employer: But this court was of opinion that the demand was barred by the statute of limitations; because an action might be brought at law for the money: And though a bill was brought in this court for it, yet it was not a mere trust, but such a demand as this court had only a concurrent jurisdiction of along with the courts of law, this case was a little more fully stated by the Attorney General thus, it was a bill brought by the plaintiff to have an account and satisfaction for

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against  
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2 Atk. 610.



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for several debentures and government securities, which Mr. *Villa Real* had received from the plaintiff at *Lisbon*, together with a warrant of attorney empowering him to receive them, for the benefit of Mr. *Sturt* the plaintiff, who had entrusted him with them ;—To this demand the defendant pleaded the statute of limitations ; against which plea, it was urged that this case was not within the reach of that statute of limitations : For that the debentures were only in nature of deposits, and the defendant accountable for them as a trustee. This point was argued before your Lordship, who determined the statute of limitations to be a full bar ; that a mere trust was not within the purview of that statute. But the present case was not a trust, but only a common dealing between man and man, for one to receive money for the other ; that as soon as he had received the money, it became the property of the plaintiff, and he might have maintained an action for it at law.—It was further insisted upon in favour of the plea, that as the plaintiff had never been in *England* since the transaction, but constantly beyond sea, and as more than six years had elapsed, that in order to bring himself within the saving of the statute 21 Jac. 1. c. 16. he ought to have returned to *England*, before he could be intitled to sue by bill for this demand. The words of the saving are, “ That if any person shall be at the time of his cause of action within the age of 21 years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person shall be at liberty to bring such action ; and after their coming of age, &c. or “ after their *return* from beyond  
 “ sea,”

"sea," as other persons having no impediment should have done."

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against

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On the other side, it was argued against the plea, and in the first place, clearly admitted by the counsel and the Court, that these deposits were of such a nature as to be affected by the statute of limitations with a bar; but it was urged, and relied upon, that the plaintiff was privileged within the proviso of the statute, on account of his being beyond sea; which upon that score preserves his demand in as full vigour as though he had brought his action as soon as it had accrued to him: But it is objected, that the plaintiff should have returned to *England*, before he had filed his bill. No case has been cited to that head, and therefore it is left at large to argue it from the general intent of the statute, and the consequences arising from such construction,

This act of parliament was not intended to put restrictions upon such persons as it has in the proviso declared to be objects of its indulgence; but rather to allow them great privileges, and not to abridge any right that they have: But if they were obliged to return from beyond sea into *England* before they can maintain an action here, the statute would be rather a snare than an emolument to them, and might in many cases virtually extinguish the demand instead of cherishing it: For suppose a person resident in the *East* or *West Indies* should sell goods in *England*, the value of them may be so small that the party would rather lose that, than add more to it, by coming an expensive voyage to sue;

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sue; besides there seems to be no reason in nature to oblige a plaintiff to come into *England*; it would only be laying fetters upon him, with an apparent disadvantage to him, without contributing any thing to the benefit of the defendant,

But this point has been determined upon this statute in 2 *Saund.* 120. *Chandler v. Villett*: There *assumpsit* was brought by an infant, and it was urged that he ought to have waited 'till his full age before he brings his action; because the six years were elapsed during his infancy, and that therefore he could not pursue his action, but according to the words of the saving of the act, which are, in six years after his full age: But this was not regarded by the Court, and the plaintiff the infant had judgment. The reporter refers to 2 *Inst.* 519, *Cotton's case* of *non claim* on fines.

LORD CHANCELLOR. This case is not to be distinguished from that in *Saunders*, and therefore the plea must be over-ruled, without prejudice to the defendants insisting upon this defence in his answer. I never knew a plea of this statute stand for an answer; if fully allowed, it would be as well to discovery as to the relief prayed.

1745.

OMICHUND  
against  
BARKER.

OMICHUND against BARKER.

IF in a current account between merchants, one of them has laid out a gross sum of money, the Court will allow interest, notwithstanding it is a current account. The defendant, when an account was directed, desired the plaintiff might produce books, &c. The Chancellor said, that might be impossible, as the plaintiff was a trader, a native of, and resident at, *Calcutta*, in the *East Indies*: But that the defendant had a right to inspect them; so he ordered a commission to go over and take copies, and said, he had some time ago directed a commission for the like purpose to *Holland*.

Equity will allow interest upon a gross sum laid out by one merchant for another, though there was an account current between them.

1 Atk. 21.

1 Will. 84.

2 Eq. Abr.

397. c. 15.

A commission sent to the *East Indies* to examine books, &c.

MILLS against WILLS.

THIS was a bill brought against the defendant *Mills*, as administrator, and against another defendant, as debtor to the estate of the intestate; and it prayed a discovery and satisfaction of a debt. The administrator in his answer confessed that he himself did not care to sue the other defendant, for fear of involving himself in an expence:—The CHANCELLOR said, a man cannot bring a bill against the debtor of a debtor, without laying some foundation; but it appearing that the defendant had submitted in his answer to account with the plaintiff,

A bill will not lie against the debtor of a debtor, ante, 194.

1745.

BARWELL  
against  
WARD.

tiff, it put an end to the question, and an account was directed.

BARWELL, Assignee of WARD, a Bankrupt,  
against WARD.

A conveyance made by a man who afterwards became a bankrupt set aside as an absolute conveyance and ordered to stand as security for so much as was really due.  
1 Atk. 260.  
S. C.

IN this case the bankrupt some little time before any act of bankruptcy committed by him, and the commission taken out conveyed a reversion of an estate for life to the defendant his sister, in consideration of 60*l.* which was due upon a bond to her, and at the time of the sale, it was proved the reversion was worth a great deal more: And the bill was to have a re-conveyance of this estate, and also satisfaction for two notes which were indorsed over by the bankrupt to the other defendant, upon which the case was this; the bankrupt being arrested and in prison, procured notes for his book debts, and sent two of these to the defendant, who was his aunt, and she discounted them, and gave money for them, which was to provide his apprentice with another master;—he not being able to teach him his trade, by reason of his confinement; after this he continued in prison two months, by which act he became a bankrupt, and which by the relation of the statute made him a bankrupt from the day of the arrest.

The Counsel for the defendant said it was a difficulty to say, what disproportion in the consideration would make the conveyance fraudulent: But  
it

it has been often said, that if a man sells his estate for less than half the value it is fraudulent: But at last the defendant said she did not desire that this should be looked upon as an absolute conveyance, but only as a security for the money due upon the bond: As to the satisfaction for the notes, it was said, that it was a transaction after the bankruptcy, but that the assignees were improper to come into this court, for their remedy is by trover at law; and if they come here only for a discovery in order to bring an action, they should have made that the reason for coming here; and then after they had their discovery, they must have paid cost, but this court will not give them satisfaction.

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The Lord CHANCELLOR was of opinion, that this conveyance was fraudulent as to the commission, being a transaction but one month before the bankruptcy; it appears to be an absolute conveyance; and though the defendant would waive it, and have it to be only a security, yet there is no proof of any thing of that sort: The defendant must convey the estate to the commissioners; but it must stand as a security for what money she really advanced as a consideration for the conveyance made to her.

As to the notes which the defendant discounted, the indorsement was void, and though the assignee might maintain trover for them, yet it is hard in an action to describe notes, and they are entitled to bring a bill in this court to have such notes delivered up to them, for the property of the notes is in them: It would be hard to make the apprentice come in for a dividend, for that might not provide  
him

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 against  
 WARD.

him another master; and though the defendant is not intitled to any of the money under this commission, which she paid in the discounting these notes upon her being decreed to deliver them up; yet she ought to stand in the place of the apprentice, and so to be intitled to what he would have been, which would be a reasonable sum to put him out.

*ALLEN against SMITH.*

Where an executor seeks the recovery of a specific chattel, he must resort to law after a discovery in equity.

**ATTORNEY GENERAL.** Where a person who is not executor, but a wrong doer gets in his possession any specific chattel of the testator, as a watch, &c. I do not know that this court will give relief, but leave them to law. But where the chattel is a bond or note, which would be difficult to describe in trover this court will relieve.

**LORD CHANCELLOR.** Where a man has got possession of all, or great part of a testator's effects, there the court upon a bill for discovery will give relief; but where it is only of a particular chattel, after discovery in this court, the party must resort to law to recover it. In the case of a bond, &c. or other thing which would put great difficulties upon the parties to describe in trover, there this court will decree such bonds to be delivered up; but discovery does not draw relief in all cases.

*Ex Parte*

1745.

*Ex Parte*  
DAVY.

*Ex Parte* DAVY.

THE petitioner *Davy*, and one *Siddon*, were in partnership, as Silk-Throwsters in Spittle-Fields, and sold silk to the bankrupt *Tomson*, to the value of 300*l.* and some time after that, they took an usurious bond for the money, in the name of *Davy*, one of the partners only; but *Davy* gave a receipt for the bond, as on account of the debt for the silk, in the name of himself and partner: And it also appeared by an indorsement upon the bond, that *Siddon*, the other partner, had received interest due upon it: After this *Tomson* became a bankrupt, and the partners applying to be let in as creditors under the commission for their bond debt, they were refused by the commissioners, upon the evidence of the bankrupt of usury, who swore that though the bond appeared to be legal upon the face of it; yet that at the time of giving it, the partners refused taking it at the usual rate of interest of five per cent. but insisted upon nine per cent. And to screen the usury, the four per cent. was made part of the principal, and that to bear five per cent. The partners, when they were refused to be let in as creditors upon their bond, applied to be let in for their simple contract debt, for goods sold and delivered, for which the bond was given; but the commissioners refused that too; and now they petitioned the great seal to be let in as creditors one way or other,

*A.* sells goods to *B.* in the course of trade, and afterwards takes an usurious bond. *B.* becomes bankrupt:—*Query*, Whether the bond extinguishes the precedent book-debts? or whether *A.* can prove either of them under the commission?  
1 Atk. 125.  
2 Ves. 489.  
Doug. 736.

U

And



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DAVY.

And for the petitioners, it was urged, that at least they might be let in for the simple contract debt, although it should turn out that the bond was usurious: For that the bond was no extinguishment of the simple contract: the latter being due to both partners, whereas the bond was only given to one: That if there was usury in this case; yet as the commissioners of bankrupts have an equitable well as a legal jurisdiction in their course of proceedings, though they had found this bond to be usurious, yet they should have allowed the partners what was fairly advanced upon it, and only have struck off the usurious excrescences. That in bills brought in this court, it is the constant course to do so: That they who oppose this petition speak inconsistently with themselves: For, in the first place, they say the bond, as such, extinguishes the book-debt, and then has another method of acting, which is by extinguishing itself: But it is absurd to say that a bond, which is void in its creation, can destroy a debt which at the time of executing such bond was an existing debt.

LORD CHANCELLOR. This is quite a new case: Usurious contracts are greatly to be discouraged; yet whenever a party comes to be relieved in this court against an usurious agreement, he can only be so upon equitable terms of paying what was really advanced with common interest: For, as on one hand, the law is to be supported, so on the other, it is hard that a creditor should lose his money really advanced when his debtor has no great equity himself, as being a sharer of the guilt of usury and making one half of the contract. The  
petitioner

petitioner upon this bond merely cannot come in as a creditor under this commission : because it is infected with usury : And though the commissioners have an equitable jurisdiction in them, yet they did right in rejecting the petitioner as a creditor : But here seems to arise a distinction, which may afford some advantage to the petitioner to let him in as a creditor for what was due for his real debt for the silk sold and delivered. It is clear, that the debt for the sale of the silk was a good one, not infected with usury, and was originally a distinct debt, and antecedent to the bond. Now although the bond afterwards, for this debt was usurious, yet the statute against usury making void such bond does not seem to affect the debt which was long antecedent to it : but that seems never to have been extinguished, because the bond was void, and could not operate upon it at all. The statute makes the securities and demand void, but that only means the demand and security at that time : and if the money had been really advanced at the time of giving the bond, both money and bond should be lost, and you cannot come in as a creditor for such debt ; but if there was a debt subsisting antecedent to the giving the bond, for which an action might be maintained, I do not know, that it has been determined that an usurious bond should destroy such prior debt : For as the bond is void, it could never extinguish an existing debt, however, I am unwilling to determine this, and do not know that this point has ever been before the courts of law ; and it would discourage usury by a construction of the statute to make the prior demand void.

1745.

*Ex parte*  
DAVE.

1745.

*Ex parte*  
DAVY.

I shall now consider the case upon the bond exclusive of the usury, and then it will be in the light of a valid bond; but even there it does not seem to extinguish this simple contract debt: The original debt was a partnership debt for goods sold and delivered in trade, and after this the debtor enters into a bond with a surety for the same debt to one of the partners only, who indeed gives a receipt for the bond as for himself and partner. The law thus far is clear, that if there be a debt by simple contract, the defendant may take advantage of that fact upon evidence, or may plead it specially: But a note given for such book-debt being only of the same nature will not extinguish it. [But *quere*, whether such note accepted by the creditor might not upon an action for the book-debt be pleaded by way of accord and satisfaction? *Quere*, whether the Chancellor did not say so?] But then the bond must be given to the same person who was a creditor by simple contract: But here it is not so given, but only to one of the partners which makes a great difference: For if an action was to have been brought upon the simple contract, it must have been a joint one and brought in the name of both the partners, and one of them singly could not have maintained it; Whereas upon the bond a joint action could not have been brought, but it must be in the name of the partner only to whom it is given: and for this reason such bond could not have been pleaded in bar to an action brought upon the simple contract: And therefore a bond to extinguish a partnership debt must be made to the partners; and then it will be of the same nature with  
the

the action, that is to be brought upon the book-debt: But then it is said, that if this bond cannot be pleaded as an extinguishment: yet as it is accepted by one partner in the name of himself and partners in satisfaction of a book-debt, it may be taken advantage of by way of accord and satisfaction: because this receipt and acceptance binds the partnership: and to be sure there may be such a thing, where a bond made by a debtor to another person and not to the creditor in satisfaction for a simple contract debt, by the direction and acceptance of the creditor may be taken advantage of by way of accord and satisfaction. But if the present bond is void by the statute, where is the satisfaction to the other partner? for the receipt is not given by the other partner, and his companion could not bind him by a separate receipt, unless there was satisfaction,

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*Ex parte*  
DAVY.

Mr. *Attorney General* then put his Lordship in mind of a circumstance, that both partners seemed to be concerned in this usury: For *Davy* had taken the bond in his own name and *Siddon*, the other partner, had indorsed a receipt for interest on the back of it, which proves his consent and acceptance.

LORD CHANCELLOR. That makes a material difference. Indeed I will not determine this question upon a petition: therefore let it be dismissed, without prejudice to any other remedy by bill or action.

Mr.

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*Ex parte*  
DAVY.

Mr. *Brown* then mentioned this case upon the head of a bond extinguishing a prior demand upon a simple contract before Lord HARDWICKE; Mr. *Amburst* sold hops to a brewer before any act of bankruptcy, but took a bond for it; after this debtor had committed an act of bankruptcy, Mr. *Amburst* petitioned for a commission upon this debt, and one accordingly issued; and it was insisted, that the commission issued irregularly and was void; because the debt was extinguished by the bond, and the latter was not given until after the bankruptcy; but your Lordship determined the commission was well issued, and that the book-debt was not so far extinguished, but that Mr. *Amburst* might still petition for a commission upon it.

LORD CHANCELLOR. It is true; but that is not like the present case: For the question here is whether the book debt was not infected and avoided by usury, as well as the bond. (a).

(a) 2 *Ves* 489. *ex parte Ship*, which was determined in 1752. Lord HARDWICKE said he could not compel the assignees of a bankrupt to pay what was really due upon an usurious contract; that it had been attempted often in equity, but refused.

1745.

PECK  
*against*  
PAYNE.

PECK *against* PAYNE.

LORD CHANCELLOR. If a man is surety for another person by bond for the receipt of money in any office, and an action is brought against such surety upon his bond, he will be entitled to an injunction in this court, until an account is taken whether any thing is due to the person who sues the bond: for though there may have been a breach of the condition; yet upon the account there may not be a penny due: And it is for this reason, that this court always enjoins upon terms, and as there are affidavits here, that the balance due to the obligee is about 500*l*. the court ordered the surety to bring that sum into the bank to be placed out in south-sea annuities, that the money might not lie dead: because the account might be a long time in taking; but if the account is settled and stated, and the clear sum appear as a balance, the court then will not enjoin proceedings on the bond.

Equity will enjoin proceedings upon a bond conditioned for the receipt of money, altho' there be a breach of the condition, provided nothing be due.

QUIN *against* HOLLAND.

IN this case there was a decree for a sale, and the party refused executing the conveyances, upon this objection, that there are some arrears of rent due: and if he was to execute, he would thereby extinguish his remedy to the arrears.

A receiver will be continued until deeds of sale under the decree are executed, for the purpose of collecting arrears of rent.

Lord

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 QUIN  
*against*  
 HOLLAND.

LORD CHANCELLOR. This objection may be made in every case, where a man is to execute conveyances: For it is hardly possible, but there should be arrears of rent at the day of executing the deeds: But in this case, here is a receiver of the rents, and you may apply to the Court for him to pay the arrears: Therefore let the receiver be continued in regard to those arrears of rent accrued, down to the day of executing the conveyances, and this before the purchaser be let into possession, and let the tenants be compelled to pay their arrears in the name of the receiver, and let them be paid according to the course of the Court.

HERBERT *against* BULKELEY.

A plea of an award to a bill for the same matter, allowed, where it did not appear there was any discovery of new evidence subsequent to the award, or any fraudulent concealment of evidence by the defendant at the time of the award.

MR. Gage having borrowed a large sum of money of Mr. Cantillon, banker in Paris, drew three bills of exchange on the plaintiff, who accepted them, as surety for Mr. Gage, and they were made payable to Mr. Cantillon for the above loan: Mr. Gage had also deposited several French *East India* actions with Mr. Cantillon as a further security: The plaintiff paid part of the bills of exchange to Cantillon, and then filed his bill against the defendant in the Exchequer in England, as representative to Mr. Cantillon, for an account, and satisfaction of the actions, and that they might go in discharge of the bills of exchange; but after several proceedings in the cause, the parties came to an agreement to refer the matters in difference to Mr. Fazakerley, and

and to produce all papers in the custody or power of either party before him: The arbitrator awarded a considerable sum of money to be paid by the plaintiff to the defendant, but the plaintiff not being satisfied with the award, now brought his bill to be relieved against it, and to have it set aside, and also for an account, and charged in his bill that the depositions of the witnesses in the cause in the Exchequer, of which the defendant had office copies in his possession, were not laid before the arbitrator, and that there were some other material papers discovered since the award; which if they had been laid before the arbitrator, would probably have produced another kind of award.

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To this bill the defendant pleaded the award in bar of an account, and by his answer admitted, that the depositions were not laid before the arbitrator; but that it was in the power of the plaintiff to have got copies of them, if he had thought them material, and to have laid them before Mr. *Fazakerly*; and denied that he knew of any papers that were lately discovered in relation to the said transaction.

Two objections were taken to this plea of the award: The first, That the award had not pursued the submission, because there was a current account between Mr. *Gage* and *Cantillon*, the balance of which was in Mr. *Gage's* favour, and that the arbitrator had not taken any notice of it, nor made any deduction of the balance out of the sum due by the bills of exchange, though the plaintiff had a right to stand in Mr. *Gage's* place for such balance,



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lance, and to have it deducted out of the sums due upon the bills of exchange, for which he was no more than a surety; and for this purpose was cited the case of *Lord Howth v. Pierſon*, before the House of Lords, in 1727, in which it was held, That where there was an account between the creditor and the person in execution, in case of an escape, the gaoler shall stand in the place of such debtor, and be allowed whatever was due to him from the person at whose suit he was in execution.

The second objection was, That there have been several new matters since discovered, which would have been proper to have laid before the arbitrator, of which the plaintiff had then no knowledge; and it was said it was more reasonable to open the award in this case, than in cases of decrees, which are often opened by bills of review, upon the discovery of new matters, which the party could not have the benefit of at the time of the decree.

Kyd on  
 Awards, 92.

LORD CHANCELLOR. It is true, where there is an account between the principal and the creditor, the surety shall be admitted to stand in the place of the principal, and shall have his equity: But though that be true in general, yet in the present case I must confine myself to the award. The question then is, Whether the arbitrator has pursued the submission? And I am of opinion that he has, and that if he had taken such general account, he had not pursued the submission; for there is no such charge of general account in the first bill, and consequently it was not a matter submitted to him, but quite extrajudicial, and which he could not take into

into his consideration. But then another question may arise, Whether, upon finding out this new charge, the plaintiff has not still a right, notwithstanding the award, to have the benefit of that equity which his principal is entitled to, upon the general account? I think this award will stand in his way; for otherwise it will be impossible for any surety to refer the matters in difference between him and the creditor to an arbitrator: if he had a mind to have a general account, he ought not to have referred it; for, by referring it, he has barred himself of the equity he had in respect of the creditor; but still the principal is bound to indemnify him; and if, upon the general account, the defendant is a debtor to him, he has a right to bring a bill against him, and to compel him to let him make use of his name, and to have the benefit of what shall be found due on such account, and then he will sue as principal; and this award will stand in his way; therefore I am of opinion, that the first objection is neither a legal or an equitable one; for that the arbitrator had no authority to enter into such general account, nor would it have been possible for him to have done it, as Mr. Gage was not a party.

As to the second objection, it is true, that if a decree is made by this Court, and afterwards a new piece of evidence is discovered, which the party could not then have any knowledge of, he may bring a bill in the nature of a bill of review, and open the decree: But I doubt whether this may be done in the case of awards. I am unwilling to give  
any

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any opinion that the party cannot in any case whatever take advantage of new evidence discovered after the award made, but I know of no case of that sort; for awards differ in many respects from decrees: decrees are made compulsory upon the parties by a judge, not of their own choice; awards are made with the parties consent, by a judge of their own election and appointment:—Decrees are made without the parties being able to prevent their cause being brought on at a particular and reasonable time; but in awards a man is master of his own time, when to refer his cause to arbitration; and if he refers it at a time when he is not properly prepared, he can blame none but himself.

On the other hand, if there is any concealment of evidence by fraud, that will open the award; for wherever there is a fraud, it infects and avoids every thing; but I am of opinion in the present case there is no new discovery of evidence; or if there was, that it was not concealed or suppressed by the defendant: Therefore, as neither of those objections can impeach the award, the plea must stand.

GORTON

GORTON *against* HANCOCK.

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*against*  
HANCOCK.

**WILLIAM HANCOCK**, having purchased an estate called *Coaldust*, borrowed part of the purchase-money of Mr. *Skelly*, and gave him a bond for it in 1724, and about six weeks after made him a mortgage of the *Coaldust* estate for the security of the same sum: He had several other fee-simple estates, and two houses in *Fulham*, upon three lives. In 1728 he made his will, and left to his wife *Elizabeth Hancock*, the defendant, the *Coaldust* estate, together with several other estates to her and to her heirs; and further devised the two houses at *Fulham* to her and to her heirs, and all such interest as he had therein, and then gave her all his real estate to her and to her heirs, and made her residuary legatee, and made her sole executrix of his will. In the year 1734, long after the making his will, Mr. *Hancock* purchased the reversion in fee of the two houses at *Fulham*, and died: This purchase was a revocation of his will *pro tanto*; for at the time of the devise the testator had only a life estate; which was extinguished in the purchase of the reversion; so that those two houses descended to the heir at law as undevise, who has brought this bill in order to have the benefit of the estate at *Fulham*, and to have an account of the rents and profits since Mr. *Hancock's* death: And if the defendant Mrs. *Hancock* insists upon charging the house at *Fulham* with the

A man seized of an estate in fee-simple, subject to a mortgage, and also seized of an estate *pur auter vie*, devises all to his wife, and makes her residuary legatee and executrix.— Afterwards, he purchases the reversion of the estate *pur auter vie*, and dies without altering or republishing his will:— The purchase of the reversion is a revocation of the will *pro tanto* which descends to the heir at law.— But equity in marshalling the assets will apply that part so descending in exoneration of the devisee

to discharge the mortgage. 2 Atk. 424, 427.

430. S. C.

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the devisor's debts, he then prays an account of the personal estate.

It was argued at the bar, that the purchase of the reversion in fee in the *Fulham* estate, was a revocation of the will for so much, and that it descended to the heir at law.

And Mr. *Chute* argued for the defendant, that the question was, Whether the mortgage of 400l. upon the *Coaldust* estate is to be charged upon it in the hands of the defendant, who is a specific devisee of it? Or whether the legal assets which are accidentally descended to the heir, shall not be first liable, as the personal estate is deficient? The defendant is a devisee specifically of all the testator's real estate, and it is by accident (not by intention) that the houses at *Fulham* have descended to the plaintiff, who was not intended to receive any benefit, and therefore is not to be particularly favoured. It is admitted that if a mortgagee is executor, or any other person executor, that the personal estate is a debtor to pay off the mortgage-money, in favour of the heir: But here the personal estate is deficient; and suppose a personal estate be exhausted in payment of debts by specialty, the simple contract creditors may come upon the real estate *pro tanto*, nay legatees have done so; suppose the personal estate was just enough to pay off this mortgage, and the mortgage was paid in that way, there the simple contract creditors may charge the real estate in the hands of the heir at law, and he would be first liable before the estate in the hands of a specific devisee: As we are executors and residuary devisees,

visees, we may apply the personal estate as we please, and suppose we paid off this mortgage with it, and there were other simple contract creditors, they must come upon the heir at law, before they can affect us, and cited the case of *Herne* against *Meyrick*, where a person indebted by bond devised his fee-simple lands to his son in tail, and gave legacies to several persons: the eldest son, being also executor, pays the bonds with the personal assets, and the legatees brought a bill to come against the real estate, in the room of the bond creditors, and he paid out of the land. The court seemed to admit, that if the lands had descended, the legatees might have been relieved in this manner: But since the testator had devised them, it was resolved that they ought to be exempted: for it was as much the testator's intention that the devisee should have the lands, as that the legatees should have the legacy, and a specific legacy is never broke into to make good a pecuniary one (e).

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Hancock.  
2 Salk. 416.  
1 P. Wms.  
201.  
1 Eq. Abr.  
143. pl. 11.

That the *hares factus*, or devisee, has the same aid of the personal estate to pay debts, as the real heir has; and this is the settled practice, though there have been formerly some cases to the contrary.

Mr. Clarke of the same side. That in a dispute how debts shall be paid out of the personal estate, real estate descended, and real estate devised, the method of marshalling the assets was to have the personalty first subjected: Then the lands descended,  
and

(e) It appears from the report of *Peere Wms.* that the case was not determined, but adjourned for further consideration.

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and in deficiency of that, then the lands devised, which are more favoured than the lands descended. That a legatee, even of a personal thing, has come against an heir by descent: but determined he cannot come against an heir by devise; because it was as much the intent of the testator that the real estate devised should come as free to the devisee as the legacy to the legatee.

2 Eq. Abr.  
 430. pl. 9.  
 1 P. Wms.  
 505.  
 2 Eq. Abr.  
 224. pl. 5, 6.  
 2 Bro. P. C.  
 1.

Suppose *A.* has two estates, and devises both for payment of debts, and then gives one to *B.* and the other to *D.* and then mortgages *D.*'s estate, he may come into this court, and have contribution against the other devisee *B.* which is the case in *Carter v. Barnardiston*; and if this is the case between two specific devisees, much more reasonable is it, that a devisee shall come for contribution against the heir by descent. The objection is, that this mortgage is an absolute and fixed lien upon the *Coaldust* estate, and cannot be thrown upon any other estate; and that objection might have been made to the case cited.

Mr. *Flawyer* on the same side. The question is, Whether the bond is to be considered independent or distinct from the mortgage, or sunk into it? If it is a distinct thing from the mortgage, and the mortgage only a collateral and further security, then the case is plain; for it being a bond debt, if the personal assets are deficient, it shall be satisfied out of the real assets descended, before the estate devised; the bond was the original debt, and was such security as was first agreed to be taken, and the mortgage which was given as a farther security afterwards,

afterwards, does not extinguish the bond; for at law, no collateral security will discharge a bond, and nothing will do it but a judgment obtained upon the very bond itself. In equity there is no merger. Suppose there had been no covenant in the mortgage, and the mortgaged estate should fall short, no doubt but the heir would be liable to the bond, which proves that the bond is not extinguished in this case. But if the bond and mortgage in this case together make but one debt, and are but one transaction, the question will be, Whether the mortgage shall be paid out of the land, upon which it is charged, or out of the legal assets descended to the heir at law?—A devisee is more to be favoured than an heir at law; the latter taking nothing but what is undisposed of by the testator; whereas a devisee takes by the express intent and will of the testator, and he cited the case of *King v. King*, 1735, at the Rolls, and of *Bartholomew v. May*.

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Mofel. 192.  
2 Eq. Abr.  
234. pl. 21.  
& 255. pl. 5.  
3 P. Wms.  
358.  
1 Atk. 487.

LORD CHANCELLOR. This question comes before the Court in a pretty odd manner, because the creditor, whose debt makes the question, has not taken any remedy either at law or at equity, nor made any election out of what estate to have satisfaction; nor has the party, who insists upon an exoneration against the heir at law, brought any bill for that or any other purpose: But it is a bill by the heir at law to have the deeds and writings of an estate admitted to be descended to him, to be delivered up, and to have an account of rents and profits to which he is intitled: When the point first appeared to be insisted upon, I thought it pretty

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clear



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clear in favour of the plaintiff; but as there is a circumstance that the heir at law has by accident come into an estate which the testator never meant him, and as the widow is so far a sufferer, contrary to the intention of her husband, who knew not that his purchasing the reversion in fee revoked his will, I was willing to hear every thing, and if possible to have assisted the widow in contribution against the heir.

As to the point of revocation it is given up, that as to this estate in question, the will is revoked; for as the estate devised was but an estate for life; it is entirely changed, and from an estate for life, it is become an estate in fee simple, and quite sunk and merged; and by this means descends to the heir at law, though mentioned in the will to be devised to the widow: It has been argued from hence, that the heir at law is not to be favoured, as he became intitled by accident, and without the intention of his ancestor: But I am of opinion, that whether this is an estate descended without the intention of the testator, or whether it is an estate given to him by the will, it will not make the equity of the defendant greater or less to have an exoneration out of such estate; for if it had been devised, the devise had been void, and he would have taken by descent as his better title, and that brings it to the common question, as if it had been a real estate descended, and the point will be, as there is one real estate devised and subject to a mortgage, and another real estate not devised but descended to the heir at law to have the devised estate exonerated out of the real estate descended?

And

And I am of opinion that the devisee of the real estate is not intitled to this in a court of equity. There is no precedent to prove this, which is one argument, that a devisee has no such right; for though it may not very frequently have happened, yet there must have been cases, where the same question has arisen. There are two considerations, in which the point is proper to be received. First, It has been insisted upon, that the bond given six weeks before the mortgage was to be considered as a distinct debt, and that the mortgage was to be reputed only as a collateral security for money due upon the bond, and that these are separate transactions; and if so, that the bond creditors will be intitled to come first to the personal estate, and in deficiency of that to the estate descended. I do not know whether that would make any difference: but it seems to me, that the bond and mortgage were intended as a security for the same debt; for tho' the bond is given some weeks before the mortgage, yet it appears from the depositions that the security could not be made out of the real estate at that time, it being as yet unpurchased; and therefore the bond was only given until the mortgage could be completed; therefore the case is the same, as if a mortgage had been made and a bond given at the same time: For this is the current way of making mortgages; and there is no difference whether it comes under the bond or covenant in the mortgage; for as *Mr. Attorney General* observed, they are either of them liens upon the real estate: This narrows it then to the single question, whether where there are two distinct real estates, one subject to a mortgage and devised in fee, the other not devised, but

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descended, the devisee is intitled to come against the real estate descended to have a discharge for the mortgage out of them?

The defendant insists that the mortgage is not to be absolutely fixed upon the devised estate, which is to be considered only as a security for the money borrowed as debt, and which charges the heir at law, who is bound both in the bond and in the covenant, and the personal estate is to be applied, not only in favour of the heir at law, who is the natural heir, but also of the devisee who is the *haeres factus*, and this has been determined in this court. It is true by equity the personal estate shall be first applied in aid of the heir: But at law no difference; for a creditor may take his remedy either against the executor, or heir and the heir had no way to help himself against the executor, but in this court, as the personal estate is considered as first liable to, and the easiest method for payment of debts, and as a man would first make use of his personal estate for that purpose, this court does the same thing; and the law is thus where the litigation is between the heir and the personal representative, but it is different where a question arises between parties who claim different branches of the real estate in different rights; and the cases cited relate only to shew a devisee equally favoured with an heir at law, and none of them shew him to be more favoured, for that would be extraordinary, except in the case cited by Mr. *Flawyer*, that where there are lands generally devised, and there is a debt by specialty, and part of the lands descend; in that case, if the  
 bond

bond creditor comes to have satisfaction, he shall have it out of the real estate descended, and not out of the real estate devised: And there have been cases before the court, where it has been so determined; and if there is enough to descend for payment of debts, that case is out of the statute of fraudulent devises; and if so at common law, no action will lie upon the bond against the devisee, for the devise broke the descent; and he could not have an action against such specific devisee before the statute. But if there are real estates enough to pay, the heir at law against whom an action will lie, shall do it, and not the devisee; and so there is no fraud; but here the ancestor has brought a real lien upon his own lands, and he thoroughly shewed an intention to charge such particular part of his land, which is very different from the case of a devisee, who has a real estate devised free to him; but here it must be presumed, that it was intended to pass to the wife *cum onere*.

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As to the cases, its truly said none come up to the present. The nearest is that of *Carter and Barnardiston* cited by Mr. *Clarke*; but the reason there is, because the testator had charged all his real estate with the payment of his debts, which shewed an intention that all his devisees should pay his debts in proportion: But that is not the case here, and therefore in order to clear this from that case, let us suppose that in the will there had been no such clause to charge all the real estate with the testator's debts, and he had devised the manor of *A.* to *B.* the manor of *C.* to *D.* and afterwards mortgaged *C.* there could be no contribution, and there might have

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have been all the same reasoning used there as here: As to the other case cited by Mr. *Flawyer* of a residuary devise, that is different: For where a man gives all his real estate to his heir at law after debts and legacies paid, he intended all his debts should be paid and mortgages are debts, and would come among the rest.

A man suffering an estate to descend to an heir at law is the same thing as giving it to him; and supposing he had given this estate in fee by devise to his heir, it would be void; and no body then could say the heir should be liable to pay the debt: It would be contrary both to law and equity, that a devisee should be preferred to an heir at law, laying even the common maxim out of the case, that an heir at law is a favourite of a court of equity; yet they both stand upon the same footing.

GORTON *against* HANCOCK.

THIS now came on by a petition of rehearing on a bill brought by the plaintiffs, as coheirs of *William Hancock* against the defendant, his widow, for an account of rents of lands devised to her. At the first hearing this question was determined against the defendant: But now after a twelve month's consideration the Chancellor gave his opinion for the defendant.

LORD CHANCELLOR. The prime question is, Whether the defendant is intitled to have the lands devised

devised to her by her husband exonerated out of the real affets descended to the plaintiff, and this will depend on two more particular questions, First, Whether there are any words in the will to throw this charge on the devisee?—Secondly, Whether according to or in consideration of those rules which have been established in equity for marshalling affets, these devised lands shall be exonerated out of the real affets descended?

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The testator sets out with a desire, that all his debts be paid in the first place, and concludes with a general residuary devise to the defendant, whom he makes his executor, and on the part of the plaintiff it is insisted that the introductory clause in the will is sufficient to charge the defendant with the incumbrance on the estate devised to her, and that she ought to take it *cum onere*, and so I think it would with regard to the creditors: But it is by no means sufficient to fix the *onus* or burden ultimately upon the devisee, or to make a variation with regard to the different funds out of which all debts are to be paid, or to transpose the order in which the funds are to be applied for that purpose. For these clauses in wills have received such a construction merely for the aid and assistance of creditors.

As to part of the real estate devised to the wife, the will is clearly revoked, and must be taken as if it never had been devised: I mean those lands which were held only *per auter vie* at the making of the will, and the inheritance of them purchased in afterwards by the testator.

It

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It was argued by the counsel for the plaintiff, that the estate was subject to the incumbrance at the time it was devised and should continue so. But I think it would sound extremely harsh in a court of equity, if I should strain to charge the devisee with this debt, and by that means lessen even the estate which remains to her under the will, when clearly the intent of the testator was to give her the whole, and totally to disinherit the heir.

As to the second question, it is a new one, never before brought in judgment, and I shall consider it in two lights. First, How would it have stood in the case of a bond or covenant, where the heir is bound without any mortgage to secure it?—Secondly, Whether the mortgage or real lien in this case will make any difference?

At common  
law, the de-  
visee was not  
liable to debts  
the descent  
being broken.

There are two periods of time which will be material for consideration; First, How would it have stood at the common law before the statute of fraudulent devises. Secondly, How since.—At common law the devisee was not liable to the demand, for the descent was broke. The rule of equity before the statute did not differ from the rule of law, unless there were some particular circumstances in the case. This court had been often attempting before the statute to make a devisee liable to specialty debts, but were not able to come at it, which was the occasion of the statute: The heir at law would have had the benefit of the personal estate in this court in case of the real: but if there were no personal estate the heir could have had no relief, not so much as a contribution from the devisee. The next consideration

consideration is upon the operation of the statute; setting the mortgage out of the case, by the statute the devisee is made liable at law, and the action is to be brought jointly against the heir and devisee. But then the question is, what judgment is to be there given?—It has been insisted by the defendant's counsel, that there ought to be two distinct judgments, First, That the heir should make satisfaction, and if he has not sufficient assets, then that the devisee should; but no precedent is cited of any judgment, nor no words in the statute applied in support of this. But it was said, that this was the only reason why the statute directs the heir and devisee to be joined in the action; for if the heir had not assets, then judgment might be entered up against the devisee. But this is not conclusive, for I take the provision in the act to have been introduced for the benefit of the creditors merely, without any regard either to the heir or devisee; for the enabling clause intitles the creditors to a new writ, and to try a new action; for otherwise there might have been a collusion between heir and devisee to play off the will or not, just as it should suit them best; and likewise the creditors might be at a loss to prove the execution of the will, it was therefore a wise provision on this point to secure the creditors at all events.

I directed the solicitors on both sides to search for precedents of judgments on this statute; but they have certified that none are to be found.—I believe few actions have been brought, the relief in this court being more expeditious; for they may have a sale directed as both the heir and executor are

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The provisions in the statute against fraudulent devises were introduced for the benefit of creditors merely.



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are before the court; but some have been brought, and three cases on this action are in print, *Clift's Entries* 243, *Smith v. Gayon*. But there is no plea or judgment. *Lilly's Entries* 145, *Joseph* against *Lord Mobun*; and the Duke and Dutchess of *Hamilton*; but no plea or judgment is mentioned.—The third is the eleventh *Q. Anne* in *Lilly's Entries* 529; but no plea or judgment. And though precedents are said to be in *Bennett's* office, no entry is to be found in that office. The declarations are all in the *debet* and *detinet*, and the same as against coheirs at common law.

Now according to the known rules, the judgment must follow the writ and the count, and from thence I conclude there was but one judgment.—*Sir William Harbert's* case, 3 *Rep.* 13. a. where the reason for judgment against both is fully set forth; besides, from the natural form the judgment is of, there cannot be two distinct judgments, as appears from *Plow.* 438, where there is a correct precedent of a judgment at large against coheirs for one heir to have contribution against the other, so that the lands descended are to be delivered to creditors upon the execution at certain annual value to hold the debt until satisfied by the receipt of profits; and if so, there is no period of time when a second judgment may be sued against the other: For when is such judgment to take place? You can never say that the first may not be satisfied out of the real assets of the heir, since the judgment is to hold *quousque debitum satisfactum fuerit*. Take it therefore, that this is to be the judgment, what relief shall be similarly given in equity? Why in case of a debt  
 by

by specialty, that the personal assets shall be first applied, and if these are deficient, the heir shall be charged for assets descended.

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There was no case cited at the bar ; but there is a case which has some resemblance to the present, and that is *Gawler and Wade*, 1 *P. Wms.* 99; Lord *Cowper* there said that it was the act of parliament which made these assets in the devisee's hands, and that requiring the heir to be made a defendant, you must follow the remedy therein prescribed: And this bill in equity is as an action at law ; but said nothing in respect to contributions between the heir and devisee. But there are two cases not in print where this point has been determined, one is that of *Saville and Saville*, before Lord *King*, and the other Lord *Conway's* case before me. There part was devised and part descended, and held that the real assets descended should be first liable. I should add another, that of *Tint and Raymond*, 27 *Jan.* 1734, before Lord *Talbot*, on a bill brought to have satisfaction where part descended and part was devised ; it was directed that on the deficiency of the personal estate an account should be taken of the assets descended, and if that were deficient an account was then to be taken of the lands devised, and by consent indeed, they were sold ; but this shews his opinion as to the order in which the assets were to be marshalled.

I take it that the notion of contribution in the case of *Gawler and Wade* is not well founded ; it was stated only by counsel, and not supported by any authority. Upon the first question, therefore, I am  
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of opinion for the defendant; and my reason is, that the descent being broken by the devise, the lands at the common law would not have been liable: and that the statute being made merely for the sake of creditors, and not at all in favour of heirs at law, the enacting clause makes wills void, as against such creditors, but leaves the law as it was before with regard to heirs; and that because in this case it would be contrary to the plain intent of the testator to make the devisee liable to this debt; so as in the whole, or part, to be defeated of her legacy. This is my opinion in case of mere specialties.

A mortgage is a debt by specialty, and the land considered as a pledge.

Harbert's case.

Secondly, Whether this being the case of a mortgage which creates a specifick lien will make any alteration?—It must be confessed that it is a specialty also, and that the land in this court is looked upon only as a pledge or security for the money, and the mortgagee may take his remedy against the executor, or the heir at his election. But the heir has always had aid of the personal estate, for this election of mortgagee will not determine which fund ought properly to be charged, nor vary the right as to those funds; this was determined, originally, in favour of the heir who stands in the place of his ancestor, and while the ancient tenures subsisted was obliged to perform the services at the common law; and before the statute of *West. 2. Ch. 18*, there were no *executions*, but of goods by *fi. fac. & lev. fac.* and though the writ of *lev. fac.* had the words *Terris* and *Catalis*, that respected emblements only, *3 Rep. 2 Inst. 394*, and so tender was the

the legislature of the landed estate, that if the goods of the king's debtor were sufficient, no execution was to be against the lands, 2 *Inst.* 18—19. and though on a bond, the lands in the hands of the heir were liable at the common law; yet Lord Coke in Sir William Harbert's case, 3 *Rep.* 12, shews, that the law gave an action of debt against him, because bound *nominatim*, and as the body was not liable, the land was of necessity: and here stepped in a court of equity directing the heir to be in the same plight as the ancestor, and to have the personal estate first applied in his favour. 1 *Vern.* 36. not being tied down to the rules of law, because it can bring both heir and executor before them at the same time.

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As to the case of *Cornish v. Mew*, Hil. 27. 28. Car. 2. 1 *Ch. Cas.* 271. when the court refused to do this in favour of an *hæres factus*, though this decree was in the time of Lord Nottingham, it could not be his, but must have been a decree of the Master of the Rolls, or some Judge fitting for him; because Lord Nottingham had expressly determined the contrary but just before, that *hæres designatus* as well as *hæres natus* should be intitled to this benefit. Lord Nottingham carried it farther in the case of *Popley* and *Popley*, 2 *Cha. Cas.* 84. but in 1 *Vern.* called *Pockly* and *Pockly*, and held that not only *hæres factus*, but an ordinary devisee should have the same benefit; and I understand, that by an ordinary devisee is meant one of particular lands, and this opinion has been followed ever since, and a devisee of particular lands has always been allowed to have

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have aid of the personal estate, and it is the experience of every term.

To pursue this observation, naturally by this will the land is given to the wife, which must mean effectually, for if given subject to the mortgage, the whole benefit will be drawn from the devisee, and rendered ineffectual.

Where a specialty creditor exhausts personal assets, the simple contract creditor shall stand in his place.

Now if the devisee is thus intitled to have the personal estate so applied, suppose there are simple contract creditors, and a specialty creditor (as the mortgagee in this case is) exhausts the personal assets, the simple contract creditors shall stand in the place of such creditors, and come upon the real assets. And here arises the question, where part is devised and part descends, out of what fund shall they be first relieved? Undoubtedly out of the real assets descended, and this is agreeable to the reason and equity of the statute of fraudulent devises: For if there are assets by descent, the devise is not fraudulent, and I think it will coincide intirely with the intention of the testator; but here comes in the objection of the more weight on the part of the plaintiff, that here is plainly an estate devised with a special *lien*, which shews the testator's intent she should take it *cum onere*; so that at the least it may be said in favour of the plaintiff there is intention against intention: But if an inference should be drawn from a testator mortgaging particular lands and devising them so mortgaged, that he intended these very lands should be liable in the hands of devisee to this burden, that would equally hold against personal assets being first applied; and it is the constant

stant direction of this court, that the mortgaged estate should be considered only as a pledge for money, it being a *lien* only, as between debtor and creditor. But as to the proper application of the funds for payment of the debts, it has no effect or relation, since the personal estate is always first applied towards payment of the mortgage, and simple contract creditors have in such case a remedy against the real estates; so shall the devisee: It is equal to the creditor to go against the land devised, and if the court would in that case construe it in favour of the devisee against the heir at law, why shall he not have that remedy directly as well as by circuit? This is agreeable to the rule laid down by Lord Macclesfield, in *Clifton v. Burt*, 1 Wms. 678. One died indebted by bond, who by will had bequeathed a legacy of 500l. and devised his lands to J. S. in fee, leaving a personal estate sufficient only to pay the bond: Held that the legatee should not stand in the place of the bond-creditors to charge the land, in regard it was specially devised; otherwise if it had descended to the heir; which case proves that as pecuniary legatees are preferred to heirs at law, much more is a devisee of lands: The great ground is, that the fund given shall not be exhausted, so as nothing shall be given, and this is agreeable to the rule of law; for every devisee is in the nature of a purchaser, and is in the *post*; and so laid down in *Harbert's case*, 3 Rep. 12. b. That the heirs shall not have contribution against a purchaser, although in *rei veritate* the purchase was not for a valuable consideration, for that is not material.

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In the search I ordered to be made for precedents, there is but one case like the present, and that indeed comes very near; it is that of *Searle v. St. Eloy* heard first before Sir *Joseph Jekyl* at the Rolls, Jan. 25th. 1727, and afterwards before Lord *King*, 28th. May 1728, rep. in 2 *Wms.* 386. A devise to *A.* his cousin, an infant, and her heirs, at her age of 21, or marriage, subject to the incumbrance of a mortgage, and the rents during her infancy to be paid to her father, and a devise of an estate to his heirs at law, subject to the payment of such of his debts as should remain unpaid, and charged a reversion, which descended with the like condition. The infant insisted that the mortgage was to be paid off out of the personal estate, and if not sufficient, then out of the monies arising by sale of the trust-estate: The defendant, the heir and reversioner, insisted that it should be paid out of the rents, &c. of the estate devised to plaintiff, which accrued during her nonage: Held at the Rolls, that the mortgage should be paid off amongst the rest of the debts by the other estate, and not to be a *lien* on the devisee's estate, and confirmed by Lord *King*, and this though the infant by her bill had submitted to pay it off; yet he directed the bill to be amended.

I have now done with the cases, and shall take notice of the observations of the counsel on both sides. The first is on the part of the plaintiffs, that by this doctrine all devisees are levelled, and a devisee of lands with a great mortgage on it, should have contribution against another devisee, where there are no assets personal, or by descent: But the  
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case of *Carter v. Barnardiston*, in 1 *Wms.* 505, will not warrant this.

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2 Eq. Abr.

224. pl. 5, 6.

The next observation is on the part of the defendant, That if she is not thus intitled, it would have this consideration, that if the mortgagee brought his action against the heir and recovered, which he might certainly do, the heir would by such doctrine be intitled in this court to have satisfaction against the lands devised, as originally subject to the mortgage: and this is rightly argued; for it is admitted that the election of the creditors will not determine what shall be ultimately the fund to be charged: It would be a most absurd consequence, if the heir should in this case draw away from the devisee the benefit which the testator meant to give her by this devise, by making her bear the burden contrary to the testator's intent, and at the same time take the benefit himself, when the testator clearly intended to give away the whole from him.

On those arguments and authorities, I have, on mature deliberation, changed my opinion. I was struck at first with the appearance of hardship in the case; but such hardships must not induce the court to break in upon its rules, and especially those for marshalling assets:—But on more full consideration, the appearance of hardship lessens; for it was by accident that this land descended; the testator did not foresee the want of a republication of the will, after the purchase of the inheritance of the estate *pur autre vie*, and this doctrine will perhaps restore exactly the will of the testator.

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I am of opinion, therefore, that the former decree be reversed wholly as to this point, and accordingly declare, that the personal estate in the first place, and afterwards the real assets descended to the heir at law, should be applied towards satisfaction of the mortgage, and the rest of the debts due by specialty of the said testator.

NORRIS against LE NEVE.

A petition for a bill of review dismissed, it not appearing that there was any error on the face of the decree, or that there was any material new proof which could not have been made use of upon former hearing.  
3 Atk. 26.  
S. C.

ON a petition for a bill of review, the case was, *Oliver Le Neve* being seised in fee of several lands, and possessed of several leasehold estates in the county of *Norfolk*, in 1674 by deed limited the same to one *Oliver Le Neve* for 99 years, in case, &c. remainder to his first, &c. sons in tail male, remainder to *Peter Le Neve*, elder brother of the said *Oliver*, junior, for 99 years, with a like remainder over, remainder to his own right heirs for ever, with power of revocation. Afterwards by will he devised the same to *John Norris* for the term of 10 years, in trust, to raise monies to pay his debts, legacies, and funeral expences, remainder to *Oliver*, junior, &c. (*ut supra*). This settlement and will were drawn by the said *John Norris*, who had acted for the said *Oliver*, senior, as his counsel for 20 years, and was by this will appointed executor.

In *August* 1679, *Norris* purchased of one *John Le Neve*, a blacksmith, who was heir at law of *Oliver*, senior, this reversion for the sum of 3*ol*.  
About

About three months after making this purchase, *John Norris*, October, 1679, files a bill as trustee of the term, together with *Francis*, father and guardian to *Oliver*, junior, against *John*, the blacksmith, to establish this will, having wrote a letter 3d. April 1679, to *Francis Le Neve*, father of *Oliver*, junior, to assure him, that he should endeavour to have the intent of his testator performed, the trust being committed to him. The blacksmith put in his answer, and takes no notice of the purchase: *John Norris* having taken renewals of some parts of the leasehold estate in his own name, during the infancy of *Oliver*, junior, the latter on his coming of age in 1683, filed his bill against him to have a conveyance of the same: *Norris* in his answer took no notice of the purchase, but made an assignment of the trust term of 10 years. In 1710, *John Norris* dies, and by will devises this reversion to his son, the plaintiff's grandfather, for life, remainder to his first and other sons in tail. In 1709, *Oliver*, junior, treated with *Norris* the son for the purchase of his reversion, and offered him 3000*l.* for the same.

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Finding the same impracticable, and his son not being quite of age, and his life precarious, he applied for a privy seal in order to his suffering a recovery of the premises; not obtaining this, and his son dying, he desisted; and in 1711 died without male issue. *Peter* entered and having himself in 1688 obtained another conveyance from the said blacksmith, he renewed the treatise, but chiefly attempted to get the former conveyance to *Norris*, the father, destroyed. This was never done, and

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in 1729, *Peter* died, leaving no issue; but by will devised this reversion which he had purchased to the three daughters of his late brother, *Oliver*, and their heirs; who, as co-heiresses and devisees of said *Peter*, got into possession of the estate and most part of the deeds. *Norris*, the son, being dead, in 1716, leaving an only son, the plaintiff's father, he in 1730, brought his bill, but no answer was put in.

In Easter Term 1731, he brought ejectments, and obtained a verdict for all the freehold lands, and had judgment. The petitioners brought a writ of error, and likewise filed a cross bill, whereby they charge, that *John Norris* the plaintiff's great grandfather, was concerned as counsel in the family, and in settling this estate; that the term for 10 years was assigned, and that he was a trustee for that term, and that he was employed in purchasing this reversion for *Peter*, and therefore his should be cancelled, and *Peter's* established;—afterwards by agreement proceedings at law and equity stopped;—plaintiff's father died in 1735, and in 1740, plaintiff filed his supplemental bill, and bill of revivor: The petitioners put in their answer to the same effect as their cross-bill. In 1741, witnesses were examined, but petitioners did not examine any; publication passed, *Hil.* 1741, and an order obtained, *Feb.* 1. 1741, That the infant plaintiff should be at liberty to read at the hearing the bill, answers and depositions in the cause, in 1679, which order was served on the petitioners clerks in court personally. *July* 1742, the causes were heard, and plaintiff obtained a decree. Petitioners in *May* 1743,

1743, preferred a petition for a review, setting forth, That they had since the decree discovered themselves to be heirs at law to the blacksmith, which petition was in *October* 1743, dismissed. And now their second petition was preferred, omitting the circumstance of their being heirs, as in the last petition, and that of *Norris's* being employed by *Peter* to purchase in the reversion; but insisting, that as he was a trustee under the will of old *Oliver*, this purchase was a breach of trust; and that since *June* last, they had discovered several pieces of new evidence: 1st, The letter of 3d. *April*, 1679, above mentioned; the bill in 1679, to establish the will; the bill in 1684, by *Oliver* junior, against old *Norris*, and *Norris's* answer; the assignment, in 1698, of the renewed leases of the leasehold estate; the relation to old *Norris* by the *Le Neves*, and several deeds to which *Norris* was a witness. These papers came out of the hands of *Thomas Martin* who was one of the executors of *Peter Le Neve*, and who appeared to have been concerned as solicitor in the country on a bill brought in 1730, and likewise as attorney on the ejectment for the petitioners.

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The general questions in this case were two: First, Whether the petitioners were intitled to a bill of review, on the foundation of new discoveries? Secondly, Whether this purchase should be deemed in equity a trust?

*Murray*, Solicitor General for petitioners. This point was not in issue at the former hearing: On a rehearing new exhibits might be made use of on leave to prove them. In the case of *Turner v. Montgomery*,

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*Montgomery, Mich.* Term last in this court, on a rehearing new exhibits, filed since the first hearing, were read; but as this point was not in issue, this matter could not be made use of on a rehearing.— If it was in issue we might still make use of it on the common order.—The objections are two, First, that these are not new discoveries; secondly, that they are not material. As to the actual notice which is inferred from the several charges made by the petitioners in the former proceedings. Facts in a bill are different from facts in an answer, because not sworn to, but thrown out by suggestion of counsel in order to discovery. As to the constructive notice inferred from those papers being in the hands of *Martin*, he was not concerned in the cause when revived in 1740; and as to his being so before on the ejectments, these exhibits could not be of use there; for they are only of use in this court. As to the bill in 1679 being read at the trial of the ejectment, and an order for its being read at the hearing, on the supplemental bill, they were not proper evidence for plaintiff's father to read. As to *Martin* being concerned in the bringing the cross-bill, and drawing the same in 1731, there were no proceedings upon it. As to the objections, that these exhibits are not material, *Norris's* letter to *Francis* shews that they might trust him with the management of their affairs, for he thereby undertakes to act for their benefit. This was a trust distinct from the trust of the will; by the bill in 1679, the collusion between him and the blacksmith appears. In 1684, the fraud in regard to the leaseholds appear. As to second question, *Oliver* was an

an infant, and as such could not act for himself: Had he been of age he would have desired to purchase it in order to improve the estate or build, for though it was only a remnant of the estate, it was more valuable to the tenants in possession than any one else; and the trustee or any who by means of being concerned as old *Norris* was in the affairs of a family, has got a scent of such an advantageous purchase will not be suffered by this court to buy such an interest for the general inconvenience of its ever becoming the interest of such persons not to act most beneficially for infants, &c. the case of *Man v. Ward* before your Lordship is similar to the present, — *Ward* was employed by *Man* to purchase an estate, the heir to which was in *Ireland*, and *Man* was to have election to make the purchase within a certain time which expired; *Ward* purchases it for himself, and the reason that it was decreed to enure for the benefit of *Man* was that by his being employed by *Man*, he had got a scent of the purchase; which kind of advantages this court will not suffer to be taken. The reason no bill was brought by *Oliver*, junior, *quia timet*, was that he had a son almost of age, and a brother who had sons. And as to *Peter*, he did not (as appears by their own evidence) know which deed was prior in date, or that (which is the great point) it was a purchase during the infancy of *Oliver*.

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2 Atk. 223.

*Clark*, for petitioners, cited the case of *Hananhouse v. Jacobson* before Lord *Harcourt*, where, after a hearing, the defendant *Jacobson*, in searching for papers to discharge himself in an account in partnership,

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partnership, found in an old trunk two letters shewing he was only a nominal partner, on which he applied for a bill of review, Lord *Harcourt* stopped the matter by refusing it ; but on application to the House of Lords the bill of review was allowed, and afterwards *Jacobson* relieved upon it.

Lord CHANCELLOR. There have been many attempts to bring this matter over again : The present application is to bring a supplemental bill, in nature of a bill of review on discovery of new matter. The grounds on which such bills are granted have been long settled, and the rule I laid down two years ago has made no alteration, but to oblige the party to make a deposit.

The rule laid down by Lord *Bacon*, who first introduced them is, that no bill of review is to be admitted unless error appears on the decree itself, or new matter has arisen, since the decree, and not at all in issue, or upon new proof which could not have been made use of though existing at the time of the decree. And the question is, whether the case is within either of the descriptions of this rule ? It has been insisted on, that the point of equity was as fully before the court as now ; the point is that *Norris* was counsel for testator in making the settlement and will, and was trustee for the term of ten years. That at the death of testator, *Oliver*, junior, was an infant, and *Norris*, during the existence of his trust, and the minority of *Oliver*, purchased this reversion, and therefore, that whatever interest he took thereby, it ought to be considered as a breach of trust, and he taking it as a trustee only,

only. Now it is manifest, these facts appeared before in the other cause: For the will is set forth in that bill, and answer, the trust term, and that *Oliver Le Neve* at the death of testator was an infant, and though no inference need be made in the bill, yet the facts from whence inferences were to be drawn were in issue before the court, and though the parties made a distinct point to the former hearing, yet they did not prejudice their making use of any other points: I am of opinion therefore, there is no ground hitherto for granting a bill of review,

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As to the second question, Whether they are new discoveries or not? I am of opinion they are not. It is not necessary to shew only that matters were not known to the parties themselves; but if known to the counsel or solicitors or attornies, it is sufficient, otherwise there would be no end to things. As to *Norris's* being concerned for old *Oliver*, it appears by these deeds:—These deeds came out of the hands of *Martin*, who admits he was attorney at law on the ejectment, and it is plain from *Martin's* letters to *Snell*, 11 May, 1732, Scit. We are not prepared to go in commission, that he was solicitor in the causes here in 1732, though he was an attorney who lived in the country; next is the letter of 3d April 1679, and I do not see what inference can be made thence, but that old *Norris* was a trustee. This too comes out of *Martin's* hands. As to the bill filed by *Norris* and *Oliver*, when an infant, this was manifestly produced at the trial of the ejectment in 1731, and read by plaintiff's father ten years before publication passed in this court;

Facts coming to the knowledge of a party's agent or counsel is notice to the party himself.



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court : For whether properly read or not is not the question : It was then known, and therefore no new discovery now.

As to the assignment of the term of ten years over in trust to *Oliver junior*, this came out of *Martin's* hands ; and as to the bill filed by *Oliver* against old *Norris*, and the assignment of the leaseholds renewed *ut supra* : This though a new discovery, yet is not material ; because the assignments were known : Yet taking it for granted they were all new discoveries, in the strongest light they cannot amount to more than corroborating proof.

This leads me to the second general question, which is the point of equity, and which I shall consider at present merely to put an end to dispute.—The trust term is antecedent to the several limitations for life, and in trust, and it is a transaction by no means to be commended or approved for a counsel, or trustee, to purchase a reversion in that manner, but ought to be discountenanced ; yet the point of equity in regard to construing this a trust is *primæ impressionis*, and has been compared to the case of a trustee of a term or an executor's renewing leases in their own names ; and I agree this of all sorts of leases, and the case of *Rumford market* was a very strong case, the lessor having refused to renew with the *c'estui que trust* ; but they all differ from the present : Because the equity of those cases is grounded on the supposed tenant's right or expectation, and the known usage of renewal : For though the tenants have properly no right, yet he is always preferred, and the ground is,  
that

that the person who settles the term in trust has a view to the courtesy in the renewal, the renewal enuring to the benefit of all the trusts: But here was no trustee of the inheritance: *Norris* was no guardian to *Oliver*, junior, nor was he a trustee for one of the remainder men more than another; for *Oliver* more than *Peter*, or *Francis*. The maker of the settlement did not intend to give to either of the tenants for life this inheritance, if he was to be a trustee, the most likely was that it should enure for the benefit of him nearest the reversion, and then the present parties could take no benefit of it: and though I should be glad to construe this trust for the benefit of the parties in the settlement, yet I see no grounds for it, or case or precedent to guide me. But there is another point, and that is the length of time and knowledge of these parties ancestors: For upon this the statute of limitations, if it commences in the life time of the ancestors, will run against the heir, though an infant, and though length of time is no certain bar, yet it will affect the present petitioners for this purchase of *Norris* was known to their ancestors in 1709, twenty years before the death of *Peter*; length of time is not only to be measured by years, but by the parties knowledge of their rights; for from 1709 the treaties were on foot, and if *Oliver* had thought he had a foundation to call this conveyance in question, could he have had more provocation than by his being disappointed of a privy seal through the means of plaintiff's grandfather? And all the new discoveries appear to have come out of the study of *Peter Le Neve*: Had it come on in 1709, things, papers, &c. might have been produced, and the parties

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Length of time, though not a certain bar will affect parties whose ancestors had a knowledge of their rights.

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ties themselves interrogated. They on the contrary offered to give 5000*l.* for *Norris's* interest : Shall this court now indulge a bill of review to deem this a trust, when submitted to by the very ancestors, for whom this trust is to enure? And the reason assigned that this is a reversion, and not a possession will not do : for this was a question about setting aside a purchase deed, and as to its being a remote interest it is plain it was considered by them as a very valuable one. Let the petition therefore be dismissed without cost.

4 Bro. P. C.  
 465.

Afterwards an appeal was brought in the House of Lords ; but that order was affirmed, without a division.

PEN *against* Lord BALTIMORE.

In a suit between the proprietors of provinces granted by the crown, to settle boundaries, the Attorney General should be a party.

THE plaintiffs in this case were, *John Pen, Thomas Pen, and Richard Pen*, proprietors of the province of *Pensylvania* in *America*, and the territories thereof. The bill was brought to have a specifick performance of articles of agreement, dated 10 *May* 1732, to ascertain the boundaries between the provinces of *Pensylvania* and *Maryland*, and what are called the three lower Counties lying between the said provinces, and likewise for a satisfaction for the costs and expences which the plaintiffs have been at on account of the non-performance through the means and contrivance of the defendant and his agents.

*William Pen*, grandfather to the plaintiff, had by will devised to some other *Pens* 40,000 acres, to take

take the same in any of the parts of *Pensylvania* that were not cultivated: Several and continual controversies had subsisted from the time of the original grant to the *Pens* in 1652 between the present parties and their ancestors concerning those three counties, and boundaries of their several provinces, and bloodshed had frequently ensued upon them. In the year 1732, plaintiffs and the defendant came to an agreement, and articles were drawn up and executed between them, purporting that a line should be drawn between the said provinces, and each party was to execute reciprocal releases. On these articles was indorsed a covenant on the part of the devisees of the unlocated lands under the will of *William Pen*, the grandfather. that they would not obstruct the performance of these articles or the right the defendant might derive to any lands under the said articles by any claim they might make or *lien* they might have thereon.

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Sometime after the defendant having room to doubt the title of the plaintiffs to these three lower counties, and that the right remained still in the crown, applied for a grant of those three counties from the crown, and the plaintiffs opposing it, all proceedings were stopped until the right upon these articles was settled in this court.

These articles were in order to settle which were the northern boundaries of *Maryland*, and southern boundaries of *Pensylvania*.

It was objected by the defendant, First, that there was a want of title in the plaintiffs, and therefore that

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that these articles could not be carried into execution: Secondly, That this is a case out of the jurisdiction of this court: Thirdly, that proper parties were not before the court; and that the attorney general on the part of the crown ought to have been made a party, as likewise the devisees under the will of *William Pen*, the grandfather, who had indorsed, and were thereby parties to these articles.

PER CURIAM. The objection of the right to these premises being in the crown is the weakest of the objections; and the single point in this case, is, whether as the matter stands, this court can decree a performance of these articles? If these lands were in *England*, without any articles of agreement, the bounds might be settled. This is a question between feudatory Lords, proprietors of provinces: And concerning not only their private interest, but the rights of government and the right of private persons, and has been well compared to the case of the Lords marchers. If a private question arose between tenants there, it was determined in the court of the marches, on which a writ of error lay in the King's Bench, being dependant on the crown of *England*; and on that account, all disputes between lords marchers were determined originally in the King's Bench, as the place where the writs of error in private affairs lay. So here the disputes of private persons in the provinces are determined in the courts of the province, on which a writ of error by way of appeal lies before the king in council. Therefore questions between proprietary

prietary lords, in analogy to the ancient law of the marches must be determined before the King in council, and always is so, notwithstanding the statute of the 16 Car. 1. which restrains the power and jurisdiction of the privy council; but a court of equity-jurisdiction is *in personam*, and therefore can extend it wherever the parties persons are within its jurisdiction: But here are in this case articles of agreement between the parties, and the sole question is, Whether a complete final decree can be made in this case, without these parties before the court.

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Objections in this court for want of parties are favourable objections, and therefore made; and on the other hand, this case in order to be heard must have been attended with great expence. The objections are of two kinds, public and private; the first is, That the Attorney General should have been a party: Secondly, That the grand children and devisees of *William Pen* of the 40,000 acres should have been so too. As to the first, it is in force, by two reasons, one, that the right to the three counties remains still in the crown: If it had rested upon that, if Lord *Baltimore* had no right, and an absolute one in the crown, I should have thought it no objection in that case against the court's decreeing; because the agreement was nugatory, nor no objection for want of parties: The other reason is, that supposing an equitable right in the plaintiffs, the legal right is in the crown: And to shew that, the defendant insists on the feoffment made, and that the duke of *York* had not the legal estate, till six months after his grant to

*Pen.*

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PEN  
against  
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*Pen.* If that should be the case, that will certainly require the Attorney General to be made a party: For whatever lands he had before he was king, he is afterwards seised of in right of his crown. The king may be a royal trustee, and if that should turn out to be the case, the plaintiffs will have the benefit of it: But the Attorney General, in order to it, must be before the court. It is true, you cannot always have a decree against the Attorney General, yet he must always be a party: For though the Court of Exchequer cannot decree against the King to convey, yet they will stay the process of the crown to impound the profits: And those not being lands within the survey of the Court of Exchequer, this court can take notice of it equally. And if it should appear that those three counties were comprised and passed legally in *Pen's* first grant, it will prevent the Attorney's being a party on that account. But the most material ground for making him a party is, that this agreement which is said to concern the proprietors of the said provinces only, will and must in the course and nature of it determine and affect the private properties of the subjects of those several provinces: For here are powers of government, jurisdiction, legislature, raising subsidies, together with all kinds of military powers granted by these deeds: If, in such case, proprietary Lords are to alter the bounds of their provinces, without the privity and consent of the crown, by whom alone such powers are vested, directed and disposed, consider the inconveniencies that must follow; this is no less than transferring lands into different jurisdictions, legislations, &c.

you

The boundaries of provinces granted by the crown, cannot be altered without the consent or privity of the crown.

you subject the people to different government, different assemblies, laws, courts, taxes, to which they never assented by their delegates; a quite different case from where they alienate, and the statute of the 7 & 8 W. 3. c. 22. sect. 16. implies as much: But this is not the case, for admitting they may, the person is only there changed, not the jurisdictions, legislations, &c. If this be so, can such a case be determined here without the representative of the crown before this court? And though supposing he was, that they could not decree the crown to license and consent that the parties might transfer as above; yet he should be a party to state the right of the crown, and shew his objections; and a stronger case to require him cannot be.

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It has been said this order of council has reserved such rights after the determination here; but that is a mistake in respect to the order; for it does not say or mean after the determination of the cause, but of Michaelmas Term next, meaning this term: There is no reservation therefore of the rights of the crown. If I was to give an opinion only, I could certainly, notwithstanding this; but I am to give a judgment, a decree; I must decree that these articles be performed, decree the naming commissioners, and making conveyances: Can I do this, without knowing whether the crown consents by the Attorney General? I am of opinion therefore, that Mr. Attorney General must be made a party.

As to the other, *scil.* the devisees of the 40,000 acres, I am likewise of opinion, that they ought to  
Z have



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have been parties: If they had been no parties to the articles, they need not to have been so here; but by their indorsement of the same date with the articles, they are actually made parties: they under hand and seal testify their assent to the articles; if they had been named in the body of the deed, they must have been named parties; for the court must decree an entire performance, and indorsement is part of the deed. Let the plaintiff be at liberty therefore to amend his bill, as he shall be advised, on payment of the common costs of the day (*e*).

*Vide* the case of the *Isle of Man*, before the council.

GREENSIDE *against* BENSON.

An action can be maintained at law upon the bond passed to the ordinary by an administrator, and that he did not exhibit an inventory of intestate's effects, is a good assignment of a breach.  
2 Atk. 248.  
S. C.

JOHN HUDSON being indebted to the defendant the sum of 300*l.* by bond, died intestate; upon his death, his widow took out letters of administration, and gave the usual bond, as directed by the statute 22 & 23 *Car.* 2. to the ordinary, the penalty of which was 600*l.*; and the two plaintiffs were her joint sureties therein. Afterwards they exhibited an inventory of the intestate's effects to the amount of 161*l.* 19*s.* The defendant *Benson* having first applied to the widow for liberty to administer, as being the principal creditor of the intestate,

(*e*) *Vid.* 1 *Ves.* 444. Decree upon the further hearing.

C A S E S

IN THE

COURT OF KING'S BENCH,

AND

HIGH COURT OF CHANCERY, &c.



of kin. However, these directions not being founded upon an act of parliament, were of themselves ineffectual; and hence arose the practice of taking bonds from administrators by which they bound themselves to a true and faithful administration of the intestate's effects. Notwithstanding such bond, it was never in the power of the spiritual court to compel the payment of debts; and there are frequent instances of prohibitions granted by courts of common law when they have endeavoured to set up such a jurisdiction.

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Afterwards came the statute of distributions, which was only intended to legitimate what was the practice of the spiritual court before, and not to enlarge the jurisdiction; wherefore the payment of debts rested exactly on the same footing as before.

'Tis true the words of the bond are very general, and the clause "Well and truly administer the assets of the intestate," may, in a general sense, be applied to creditors as well as legatees: But in the cases which have arose upon this act of parliament, the courts of law have settled the construction of these words: The first is, that in *Lutw.* 882. *Brown v. the archbishop of Canterbury*; where an action was brought on an administration-bond, and the breach assigned was, That the defendants had not duly administered, in not having paid a certain debt: Upon demurrer, judgment was given for plaintiff; but afterwards upon writ of error reversed in the Exchequer Chamber: Because, though

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though the breach assigned was within the words, yet not within the meaning of the bond. In *Salk* 316. 'tis held, That though a person intitled to distribution may sue an administration-bond, for want of administrators having delivered in his account; yet a creditor cannot.

Thus, the courts of common law have construed those bonds, that no use can be made of them, either for the payment of debts, or the taking an administrator's account for the benefit of a creditor.

But how does the case stand here? In the present an action has been brought at law; and the court of law, which had a proper jurisdiction, has determined, that this is such a breach as the ordinary might assign, and might recover upon; and therefore, the question comes to this, Whether there is any ground in this court, distinct from that at law, to give relief? And I am of opinion that there is none; but that the determination at law was right: for this case is different from the cases which have been mentioned: Consider the state of it; a verdict is first found by a jury, that there were assets *ultra* that sum which appears to be exhibited in the administratrix's inventory; upon the strength of this verdict, an action is brought upon the administration-bond, and the breach assigned is, that she did not exhibit an inventory of the intestate's effects: And this is such a breach as is within the meaning of the bond, and of the act of parliament: for it is part of the jurisdiction of the ecclesiastical

tate, and being denied, finding that her inventory amounted to no more than 161l. was very suspicious of fraud; and therefore sent certain persons to inspect and take an account of the intestate's effects; who reported them to be worth 280l. and upwards; upon this he brought an action upon his bond against the administratrix\*; to which she pleaded *nul assets ultra* 54l. *Benson* replied *ult.* and upon proceeding to trial gained a verdict and judgment by default.

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\* *N. B.* It happened that the administratrix had paid 105l. for arrears of rent, which being a debt equal in its nature to a bond debt, she had a right to prefer: she had likewise expended 5l. upon her husband's funeral; but it seems the Court of Chancery never allows more than 40s. against creditors.

Some time after, at the instance of defendant *Benson*, three actions were brought in the name of the ordinary, upon the administration bond against the widow and her two sureties, the plaintiffs, and the breach of the condition assigned was, That she had not duly administered, because she had not delivered a true and perfect inventory of the intestate's effects; and judgment was obtained upon these actions likewise for want of defence: upon which the plaintiffs, the sureties, have brought this bill, in order to be relieved against the two judgments obtained at law against them, upon this equity, That such administration-bond ought not to be put in suit by the ordinary for the benefit of creditors, the payment of debts not being one of those

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purposes for which that bond was given as a security.

And two questions were made: First, Whether the plaintiffs were not intitled to be relieved absolutely against the judgments, and to have them intirely set aside. Secondly, If not intitled to such general relief, yet whether they were not intitled to some relief, and what?

LORD CHANCELLOR. It has been insisted for the plaintiffs, That the defendant *Benson* has no right to make any use of this administration-bond; for that it was intended by the statute only to secure the performance of such things as are under the jurisdiction of the spiritual court:

That the spiritual court cannot entertain jurisdiction with regard to debts, which are only recoverable in courts of law; and therefore the payment of debts is not one of those things for which these bonds are intended as a security. It must be admitted that this is a true and proper construction, and well warranted by cases in the books.

Before 22 &  
 23 Car. 2.  
 intestate's  
 effects distributed  
*pro salute animæ.*

Before the statute 22 & 23 Car. 2. the law of administrations depended upon the two statutes of *Edw. 3.* and *H. 8.* which directed the effects of the intestate to be distributed *pro salute animæ*, and in pious uses: But great inconveniencies being found to arise in families on account of this sort of distribution, the spiritual court fell into a method of directing administrators to distribute among the next  
 of

assets will extend in a due course of administration, let there be a perpetual injunction to stay the defendant's proceedings at law upon the administration-bond:—But in default of such payment, let the plaintiffs bill be dismissed with cost.

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ecclesiastical court to compel an administrator to exhibit an inventory at the instance of a creditor, and it is the constant practice for creditors to sue in the spiritual court for that purpose, and never prohibited by courts of law: —And therefore this case does not fall within the reasoning of the cases abovementioned: —The breach here assigned, is manifestly in wrong and prejudice of a creditor in a matter which falls within the jurisdiction of spiritual courts: —And therefore, the condition being broke, and the bond forfeit, there is no foundation to come into the court for relief.

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The ecclesiastical court can compel an administrator to exhibit an inventory at the instance of a creditor.

But it is objected, that a creditor cannot examine into the inventory, but must take it as it is, and that in the present case an inventory has been in fact exhibited, and the creditors, cannot examine in the spiritual court, whether it is true or false: —And to this purpose is cited the case of *Bellamy and Alden*, Noy. 78, and I take it to be true, that a creditor cannot cite an administrator to prove and make out his inventory in the spiritual court: —But is not the delivering a false inventory a breach of the condition in the bond? —Suppose the inventory in this case had amounted to no more than 5l. would that have come within the meaning of the bond? —To say that, would be to strike out the words, —“ True and perfect.” —To cite the administrator to prove his inventory is one thing: —and to assign a false inventory

Latch 117.

A creditor cannot cite an administrator to prove his inventory.

1745. } tory as a breach of the condition, of the bond is  
 another.

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The second question is, whether the plaintiffs are not intitled to some sort of relief, *i. e.* whether the judgment shall stand as security to the defendant for his whole debt, or only *pro tanto* as the assets remaining in the hands of the administratrix will extend to pay in a course of administration? And I think it would be hard upon the plaintiffs to be obliged to pay any more than what shall appear to be due upon the account: For though bail are in general answerable in default of principal; yet where it is a matter which depends upon an account, this court will not suffer the penalty to be made use of against sureties, any farther than for securing the payment of what shall be ascertained to be due upon the account. Besides, in the present case, if the surety should be compelled to pay defendant his debt it would be attended with this peculiar hardship, that they would be bound by a verdict obtained for want of defence where they were no parties to the suit. Every body knows how loosely such things pass at assizes when there is no defence, and what slight evidence is taken.

Therefore let it be referred to the master to take an account what is due to the defendant *Benson*, and likewise what assets remain in the hands of the administratrix and let such assets be applied in payment of the said defendant, *Benson*, his debt and cost; And upon payment thereof, as far as the assets

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Therefore let it be referred to the master  
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ministratrix and let such assets be applied in  
ment of the said defendant, *Benson*, his debt and  
cost; And upon payment thereof, as far as the  
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